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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ALFRED ARTHUR SANDOVAL,
Petitioner,

v.

CALIFORNIA
Respondent.

On Writ of Certiorari to the Supreme Court of California

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

July 8, 1985—Petitioner was arraigned in Los Angeles County Superior Court in case No. A70386 and charged with two counts of murder and one count of attempted murder occurring on October 13, 1984, and two additional counts of murder occurring on October 31, 1984. (See Clerk's Transcript, p. 539; hereinafter "CT").

December 3, 1986—The prosecution began its case and rested on December 22. The defense case concluded on January 20, 1987, and all parties rested on January 26 (CT 1457).

February 10, 1987—The jury began deliberating on February 10, and returned guilty verdicts relating to the October 13, 1984 charges (CT 1496-1497). On February 23, the jury returned guilty verdicts on the October 31, 1984 charges (CT 1671).

March 2, 1987—Penalty trial began, and the case was submitted to the jury on March 12. On March 18, the jury declared an even deadlock (CT 1681). The court directed deliberations to continue, and on March 19, the jury returned life verdicts on counts 1 through 3, and a single death verdict on count 4 (CT 1733).

December 14, 1992—The California Supreme Court affirmed petitioner's convictions and judgment of death.

February 10, 1993—The California Supreme Court denied petitioner' petition for rehearing.

SUPERIOR COURT OF LOS ANGELES COUNTY

No. A760386

THE PEOPLE OF CALIFORNIA

v.

ALFRED ARTHUR SANDOVAL

EXCERPTS FROM JURY VOIR DIRE

* * * *

[1744] First is the burden of proof in a criminal case. For those of you who have sat on a civil case, I want you to immediately, if not sooner, forget the burden of proof. The burden of proof is as follows in a criminal case:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all of the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Every person who testifies under oath or affirmation is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

* * * *

[1756] PROSPECTIVE JUROR YONEKURA: Are you still—let's see, on me? No, it doesn't. I know what I discussed earlier three weeks ago and I know what I said. But I'd still have a clear mind and I am keeping things separate to where I don't have like a prejudgment on how I feel. And it's not going to affect the case.

MR. APPLEBAUM: Okay. Now you haven't heard any evidence in this case?

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: Nobody has come up and sat in the chair behind Miss Hall here?

PROSPECTIVE JUROR YONEKURA: That's right.

MR. APPLEBAUM: The Court read a couple of preliminary instructions on presumption. If I asked you to vote right now in terms of guilt or innocence, what would you do? How would you vote?

PROSPECTIVE JUROR YONEKURA: I don't think I could decide.

MR. APPLEBAUM: Okay. That's an interesting thing. And I think that's a very common thing, "I can't decide because I haven't heard anything."

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: Remember what the Court said? There is a presumption of innocence. Mr. Sandoval is presumed to be innocent?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Okay. But by your saying "I can't [1757] vote right now. I can't decide because I haven't heard anything," what you are telling me is in your gut that you are not feeling that presumption. Can you put your mind and your heart and your feeling and cloth Mr. Sandoval right now and presume him to truly be innocent? You have heard no evidence.

PROSPECTIVE JUROR YONEKURA: Yes, possibly, yes.

MR. APPLEBAUM: Possibly? It's a little hard, isn't it? You are shaking your head up and down. I assume that means yes?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Why is that hard?

PROSPECTIVE JUROR YONEKURA: Because you are just taking his word for it. You know, without hearing any evidence.

MR. APPLEBAUM: But the burden of proof is on the prosecutor.

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: You know there is the State all the might and majesty of the State of California?

PROSPECTIVE JUROR YONEKURA: Right.

PROSPECTIVE JUROR ARANGIO: May I say something?

MR. APPLEBAUM: Sure.

PROSPECTIVE JUROR ARANGIO: If there wasn't a question, he wouldn't be here. And I think that's what she's trying to say.

MR. APPLEBAUM: Is that what you are feeling?

PROSPECTIVE JUROR YONEKURA: Yes.

[1758] MR. APPLEBAUM: You have some questions in your mind. There is the old saying where there is smoke, there is fire?

PROSPECTIVE JUROR YONEKURA: Right.

MR. APPLEBAUM: And the reality is that you don't really presume him in your mind and your heart to be innocent right now?

PROSPECTIVE JUROR YONEKURA Right.

MR. APPLEBAUM: There is some nagging doubts, right?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: Does anybody have any different feeling? I mean that's real human life feelings. I understand that. Anyone feel any different than that? Really presume Mr. Sandoval to be innocent right now?

Mr. Khan, how do you feel about that?

PROSPECTIVE JUROR KHAN: I try to go on the feeling of him being innocent right now because he is innocent until he is proven guilty. And I haven't heard anything proving him guilty, so I assume he is innocent.

MR. APPLEBAUM: But you understand where Miss Yonekura is coming from?

PROSPECTIVE JUROR KHAN: I understand where she is coming from, yes.

MR. APPLEBAUM: Where there is smoke, there is fire. He got arrested.

PROSPECTIVE JUROR KHAN: Well, lot of people be arrested and be innocent.

[1759] MR. APPLEBAUM: Does anyone have any feeling about that that sometimes mistakes are made?

Mr. Carlson, how do you feel about that?

PROSPECTIVE JUROR CARLSON: I assume they are made, yes. But I couldn't make a decision one way or another the way I sit right now.

MR. APPLEBAUM: So if I asked you to vote right now in his terms of guilt or innocence, you'd just throw your hands up and say "I couldn't do it"?

PROSPECTIVE JUROR CARLSON: I wouldn't vote period.

MR. APPLEBAUM: I think that's a fair and honest answer. This is the time to tell the truth. The reality of what I am asking you to do is very difficult. We can say we agree with the presumption of innocence as an idea, as an intellectual idea, but it's hard to feel it down here, isn't it? Truly?

PROSPECTIVE JUROR CARLSON: What I believe is what the judge said. You have to prove him innocent or guilty. Until that happens, I couldn't make a—

MR. APPLEBAUM: That brings me to another interesting thing. You hear some interesting things when we start talking about this stuff that you can't make a decision until Mr. Milton proves him guilty or I prove him innocent, in effect. Okay.

That brings us back again to what the Court read earlier. This burden of proof is only on the prosecution. Think about this for a second, in terms of an individual being charged by the State and the weight of [1760] that. It's up to the State to prove a person guilty, if they can, beyond a reasonable doubt. Okay? I don't have any

burden of proving innocence. Mr. Sandoval is presumed to be innocent like we all are.

I mean, this is is not something that's unique to Mr. Sandoval. Would you agree with that that everybody is clothed, that if we were charged on a traffic ticket or something. We are all clothed with a presumption of innocence?

PROSPECTIVE JUROR CARLSON: I would hope so, yes. But we're talking my feeling. And like I wouldn't or couldn't vote.

MR. APPLEBAUM: Okay. Now what I am trying to do is bring your feelings up to where you can feel them and touch them and start playing with them and then say okay, now I have intellectualized my feelings and I can take them and put them on the shelf and really put my mind in a condition that I can truly say that I feel that the State has the burden of proving each and every element of these charges beyond a reasonable doubt. And if they can't do that, then I would vote not guilty.

You see what I am saying?

PROSPECTIVE JUROR CARLSON: Yes.

MR. APPLEBAUM: That's what the real burden is. And it's a high burden. Criminal law has the burden of reasonable doubt which is the highest burden in all of law. We won't get into the definitions right now because we can define it all we want. It's really what you feel. [1761] But in civil cases where we talk about money, it's less. You know, it flops over the middle, basically. This is almost true certainty—

MR. MILTON: There is an objection to that characterization. The Court has given the definition of prove beyond a reasonable doubt.

THE COURT: Objection sustained. As I have told you what reasonable doubt is and you are to assume that it is what it is.

MR. APPLEBAUM: It's an abiding conviction to a moral certainty of the truth of the charges. An abiding conviction is something that stays with—

THE COURT: Mr. Applebaum, perhaps you can ask the questions rather than deliver a narrative or lecture.

MR. APPLEBAUM: Mr. Carlson, in terms of your feelings, do you think that you could really now try to put aside this gut feeling that you have and deal with this presumption of innocence and make the State prove their case if they can?

PROSPECTIVE JUROR CARLSON: I heard the Judge's instructions, but I still say I couldn't vote at this time guilty or not guilty.

MR. APPLEBAUM: Okay. If I told you that again the law would say—let me rephrase it.

Let's assume that the State put on the case. You heard witnesses now, okay? And you felt after listening to these witnesses that Mr. Milton did not prove his case beyond a reasonable doubt. Some elements were [1762] not proven. You didn't believe some of the witnesses, whatever, okay? Defense looked at the situation and said "I am not going to put any witnesses on. We don't think the State made their case either."

Would you then vote in a situation like that?

PROSPECTIVE JUROR CARLSON: If I didn't believe any of the witnesses, yes.

MR. APPLEBAUM: Sure, okay. And in a situation like that, I assume if you didn't believe the witnesses or didn't feel that the State proved their case, you'd vote for not guilty, right?

PROSPECTIVE JUROR CARLSON: Yes.

MR. APPLEBAUM: Same thing occurring right here. We're starting out with that presumption. Fair enough?

PROSPECTIVE JUROR CARLSON: Uh-huh.

MR. APPLEBAUM: Can you accept that?

PROSPECTIVE JUROR CARLSON: Well, I don't know what I am accepting. I made a statement. I can't change it. At this time can I couldn't vote.

MR. APPLEBAUM: Intellectually you can accept it; emotionally you can't?

PROSPECTIVE JUROR CARLSON: That's right.

MR. APPLEBAUM: All right. That's fair enough. That's what we're here for.

Mr. Brown, how about you. Can you accept that idea?

PROSPECTIVE JUROR BROWN: Which idea are you referring to?

[1763] MR. APPLEBAUM: Just presumption of innocence.

PROSPECTIVE JUROR BROWN: Yes, because that's the law. However, you sort of re-defined the law by bringing in our bias.

MR. APPLEBAUM: Well, I am talking about your real feelings now. There is smoke and fire?

PROSPECTIVE JUROR BROWN: I know what the law is. I could vote innocent at this juncture.

MR. APPLEBAUM: Okay. How about what Miss Yonekura said, the idea of some bias?

PROSPECTIVE JUROR BROWN: Well, you have defined that we all have our biases. We are all ethnocentric. This is ability in bias and that's what you're talking about. Now in that frame of reference, you are putting another definition on it.

MR. APPLEBAUM: Okay. How do you feel about that, though, using your personal feelings? I am talking about you?

PROSPECTIVE JUROR BROWN: I wouldn't have any trouble in setting aside. Now you are talking about at this juncture before we heard any evidence. So by definition, he has to be innocent.

MR. APPLEBAUM: Okay. Now in terms of smoke and fire, though, in terms of your gut reaction, let's take the law aside now and talk about Don Brown and what's going on inside of Don Brown?

PROSPECTIVE JUROR BROWN: We're used to setting this aside. We have to.

[1764] MR. APPLEBAUM: It's important to do that.

PROSPECTIVE JUROR BROWN: Yes, it's important. I feel it's very important.

MR. APPLEBAUM: Do any one of my nine folks to the right here feel that you cannot set aside this kind

of gut reaction that really we all have? I mean that's reality. Mr. Arangio?

PROSPECTIVE JUROR ARANGIO: Of course.

MR. APPLEBAUM: Miss Yonekura, you voiced that you still have it. You think you can set it aside?

PROSPECTIVE JUROR YONEKURA: I think I can, yes.

MR. APPLEBAUM: Mr. Torzon?

PROSPECTIVE JUROR TORZON: I am sure.

MR. APPLEBAUM: Mr. Khan?

PROSPECTIVE JUROR KHAN: Yes.

MR. APPLEBAUM: Mr. Alexander?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. APPLEBAUM: Mr. Brown and Mr. Carlson I have already dealt with. Mrs. Fahnestock?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I assume. And I believe the fact that the defendant is innocent at this point.

MR. APPLEBAUM: Okay. You'd require the State to prove their case beyond a reasonable doubt if they can do that?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. APPLEBAUM: Would you hold Mrs. Kopple and myself and Mr. Sandoval to any burden of proving his [1765] innocence at all?

PROSPECTIVE JUROR FAHNESTOCK: That's not within the law, no.

MR. APPLEBAUM: Okay. And last but not least, Mr. Flood. How do you feel about it?

PROSPECTIVE JUROR FLOOD: The burden is on the prosecutor and the man is innocent until proven guilty. That's all there is to it.

MR. APPLEBAUM: And emotionally?

PROSPECTIVE JUROR FLOOD: Emotionally, there really are not too many emotions, really. The man is innocent and things may change during the trial because of evidence and witnesses or whatever. But going to have to prove it to me.

MR. APPLEBAUM: While I have you and Miss Yonekura, I have never had this situation where two people work together one one jury. It's unusual out of a county this size to plunk two people down like that.

How do you feel about that, Miss Yonekura, that you being on a jury with a co-employee? You think that would—

PROSPECTIVE JUROR YONEKURA: I work on days and he works at night. We don't see each other.

MR. APPLEBAUM: Okay. Ships in the night passing?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. APPLEBAUM: The fact that your shifts may change or something that you do work for the—

PROSPECTIVE JUROR YONEKURA: We work in a different [1766] unit. We work in the same unit, but different supervisors. I am on a different floor than he is. We don't see each other.

MR. APPLEBAUM: So you don't feel that that would affect you?

PROSPECTIVE JUROR YONEKURA: No.

MR. APPLEBAUM: How about you, Mr. Flood?

PROSPECTIVE JUROR FLOOD: Not at all. I seldom see Ginger at all.

MR. APPLEBAUM: Mr. Flood, you have lived in several foreign countries under different laws, in effect. We in this country, as you well know, have only two verdicts that you can come in with, either guilty or not guilty, acquittal or guilty, in effect.

In Scottland, for example, there is guilty, not guilty and not proven. And you see the difference with those three?

PROSPECTIVE JUROR FLOOD: Yes.

MR. APPLEBAUM: In this country we would lump in not proven and not guilty into one super category. Would you again hold the State to that type of verdict?

PROSPECTIVE JUROR FLOOD: Yes.

MR. APPLEBAUM: You have any problems with that?

PROSPECTIVE JUROR FLOOD: No problem.

MR. APPLEBAUM: Does anyone else have any difficulty with that concept? That not proven means the same thing as not guilty.

Do any of you nine ladies and gentlemen feel [1767] that in a case like this—you know, you read a lot in the newspapers about homicides in this town. You read a lot about "Gee, I don't know, gang violence, all kinds of violence, that if you felt that the state did not prove their case, each and every element of their case beyond a reasonable doubt that you'd have any difficulty going back and talking to your neighbors and friends and family and saying I voted not guilty in a homicide case? I mean there are subtle pressures put on sometimes.

Mr. Arangio, I see your head?

PROSPECTIVE JUROR ARANGIO: We're supposed to come to a decision and make that decision without a reasonable doubt and that would be my decision. I wouldn't have any doubt.

MR. APPLEBAUM: You are not worried about having to explain things to people?

PROSPECTIVE JUROR ARANGIO: No, I don't worry about things like that.

MR. APPLEBAUM: They are not here listening to evidence. You are, right?

PROSPECTIVE JUROR ARANGIO: Right.

MR. APPLEBAUM: But the reality is sometimes you know for a fact your friends, neighbors and families are going to asking you about it?

PROSPECTIVE JUROR FLOOD: Sure, if I get on the case.

* * * *

[1935] Jurors are beginning to become visibly bored. And I realize that in spite of that, you have a job to do. But every question is proceeded by a lengthy preamble which could be substantially shortened and focused for the juror.

Those are my comments. Your request for challenge or cause is denied.

(Bench conference concluded.)

THE COURT: Mr. Milton.

MR. MILTON: Thank you, Your Honor.

Good morning, ladies and gentlemen of the jury. My questions to you will be brief. I will move through them as quickly as I possibly can. I don't want you to get the impression that there is something missing or I am somehow disadvantaged because I ask less questions than my counterparts, because I want to ask those types of questions that I believe will determine your suitability for this type of a case.

I will begin with Mrs. Lewis. Mrs. Lewis, the standard of proof in a criminal case, proof beyond a reasonable doubt. Did you read that in the juror's handbook?

PROSPECTIVE JUROR LEWIS: I didn't really read it. Since I have been on jury duty before.

MR. MILTON: Have you ever heard that? You have heard the standard then in the prior case?

PROSPECTIVE JUROR LEWIS: Right.

MR. MILTON: And the Court has instructed you as to [1936] what that means?

PROSPECTIVE JUROR LEWIS: Right.

MR. MILTON: Will you, to the best of your ability, apply that standard of proof in this case?

PROSPECTIVE JUROR LEWIS: I certainly will.

MR. MILTON: At the conclusion of this case, if you are persuaded beyond a reasonable doubt that the defendant committed these offenses and the offenses were proven, would you find him guilty?

PROSPECTIVE JUROR LEWIS: Yes, sir, if it was shown to me that the evidence showed that he was guilty, I could find him.

MR. MILTON: If you were persuaded beyond a reasonable doubt that the offenses had been committed and the defendant is the one who committed them, and you were persuaded beyond a reasonable doubt you have to find him guilty. Do you understand that?

PROSPECTIVE JUROR LEWIS: Right, right.

MR. MILTON: Can you think of any reason—well, let me ask you this. Is there anything that we ought to know about you?

PROSPECTIVE JUROR LEWIS: No. You have asked all the questions.

MR. MILTON: Is there anything that you'd like to discuss that we've discussed so far?

PROSPECTIVE JUROR LEWIS: No.

MR. MILTON: No question about your function as a trial juror?

[1937] PROSPECTIVE JUROR LEWIS: No.

MR. MILTON: You willing to accept His Honor's instruction as it is absolutely?

PROSPECTIVE JUROR LEWIS: Yes.

MR. MILTON: And you are willing to accept your responsibility as a trial juror to fairly and accurately determine the facts of this case?

PROSPECTIVE JUROR LEWIS: Yes, sir.

MR. MILTON: Will you, to the best of your ability, carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR LEWIS: I sure will.

MR. MILTON: Mr. Lin, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR LIN: No.

MR. MILTON: You think you understand what your function would be as a trial juror in this case?

PROSPECTIVE JUROR LIN: Yes, I do.

MR. MILTON: As you understand the standard of proof, proof beyond a reasonable doubt?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: At the conclusion of this case, if you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty?

[1938] PROSPECTIVE JUROR LIN: Yes.

MR MILTON: Will you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR LIN: Yes.

MR. MILTON: Whether you agree with His Honor's instructions or not, you will follow them absolutely?

PROSPECTIVE JUROR LIN: Yes, I will.

MR. MILTON: Mrs. Santana, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR SANTANA: No.

MR. MILTON: Do you think you understand what your function would be as a trial juror?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: If at the conclusion of this case you were persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Do you understand that if you were persuaded beyond a reasonable doubt, and I don't mean the other jurors, if you at the conclusion of this case were convinced beyond a reasonable doubt that this defendant committed these murders, you'd have to find him guilty. Do you understand that?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Will you give this case your full [1939] attention, your best effort and watch every person who takes that stand that testifies, listen very carefully to what he or she has to say, including that person's demeanor and considering that person's motive or interest or bias or any other thing the Court instructs you to consider when you are determining the believability of that witness?

PROSPECTIVE JUROR SANTANA: Yes.

MR. MILTON: Mr. Flood, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FLOOD: No.

MR. MILTON: You think you understand what your function would be as a trial juror in this case?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: And there has been discussion about the defendant taking the stand or not taking the stand. The defense has said repeatedly that they don't have to do anything. Do you realize, Mr. Flood, that if they do not do anything and the evidence is such a state that it convinces you beyond a reasonable doubt that the defendant committed these offenses, you'd have to find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: So it doesn't matter what they do. If you—the bottom line is are persuaded beyond a reasonable doubt the truth of the charges and that the defendant is responsible for them, you'd have to find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

[1940] MR. MILTON: There has been a lot of discussion with regard to a situation of one juror disagreeing with the others in the jury room and—well, let me ask you this. Let's assume it's 11 to one. You are the one that disagrees with the others. Don't you agree that merely because the other 11 disagree with you, you wouldn't change your mind, would you, out of embarrassment or something like that, would you?

PROSPECTIVE JUROR FLOOD: No.

MR. MILTON: Nor would you just stick with it because you have made that commitment and would be embarrasing for you to stick with it. Wouldn't you listen

to further deliberation and if they were ab'e to convince you where you were wrong, you wou'd change your mind.

On the other hand, if they were unable to convince you where you were wrong, you would remain with your original position?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: The standard of proof, Mr. Flood, proof beyond a reasonable doubt, the Court has given you that instruction before and he will give it to you at the conclusion of this case. Do you think you understand that standard of proof?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: Are you willing to apply it in this case?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: If, at the conclusion of this case, [1941] you are persuaded beyond a reasonab'e doubt that this defendant committed those murders, would you find him guilty?

PROSPECTIVE JUROR FLOOD: Yes.

MR. MILTON: Mrs. Fahnestock?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: Mrs. Fahnestock, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FAHNESTOCK: No.

MR. MILTON: Do you think you understand what your function would be as a trial juror?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I do.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, do you think you understand what that means?

PROSPECTIVE JUROR FAHNESTOCK: I believe I do.

MR. MILTON: Are you willing to apply that standard in this case to the best of your ability?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: Will you give this case your full attention, your best effort and carefully analyze the facts

of this case and apply the law that the judge gives you to the facts as you determine the facts to be?

PROSPECTIVE JUROR FAHNESTOCK: I will.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that this defendant committed these offenses, would you find him [1942] guilty?

PROSPECTIVE JUROR FAHNESTOCK: Yes, I would.

MR. MILTON: Mrs. Fahnestock, there have been comments with regard to transactions being separate, treating them completely separate. The facts in this case might indicate that that may not be so. His Honor's instructions may tell you to do otherwise. Will you promise that you will follow his instructions and not something that some lawyer is telling you that you should do?

MS. KOPPLE: Objection. A narrative.

THE COURT: Overruled.

MR. MILTON: Would you do that?

PROSPECTIVE JUROR FAHNESTOCK: Yes.

MR. MILTON: I call it lawyer talk from anybody. The lawyer talk is not important. It's the facts that you determine the facts to be and His Honor's instructions. Do you agree?

PROSPECTIVE JUROR FAHNESTOCK: Yes, that is. Yes.

MR. MILTON: Mr. Carlson?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Do you understand what your function would be as a trial juror?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: There have been comments and suggestions from certain questions by Mr. Applebaum and Mrs. Kopple about a number of things, self defense, alibi, PCP, snitches, informants. I am not here to try to try [1943] this case during this voir dire of this jury selection process. Those things that have been suggested doesn't

necessarily mean that they are true. Do you understand that, Mr. Carlson?

MS. KOPPLE: Objection.

THE COURT: Overruled.

PROSPECTIVE JUROR CARLSON: Yes, I do.

MR. MILTON: You will determine what the facts are. If self defense exists or doesn't exist, you will determine that. Do you understand that?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Are you willing to do that?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that in this case?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: If, at the conclusion of this case, you believe beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Mr. Carlson, will you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that His Honor gives you to those facts?

PROSPECTIVE JUROR CARLSON: Yes.

MR. MILTON: Mrs. Lopez. Mrs. Lopez, is there [1944] anything that you would like to discuss that we've discussed so far of something that you might not understand with regard to your function?

PROSPECTIVE JUROR LOPEZ: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt. Are you willing to the best of your ability to try to apply that standard in this case?

PROSPECTIVE JUROR LOPEZ: Yes.

MR. MILTON: If you were persuaded at the conclusion of this case that this defendant committed these offenses beyond a reasonable doubt, would you find him guilty of them?

PROSPECTIVE JUROR LOPEZ: Yes.

MR. MILTON: Mr. Lumas, you have any questions with regard to your function as a trial juror?

PROSPECTIVE JUROR LUMAS: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that in this case to the best of your ability?

PROSPECTIVE JUROR LUMAS: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these offenses, whether they put on any defense, whether they rest, all those scenarios that they've raised, whatever they do or don't do, if at the conclusion of this case you believe beyond a reasonable doubt that this defendant committed these murders, you'd find him guilty, wouldn't you?

[1945] PROSPECTIVE JUROR LUMAS: Yes, sir.

MR. MILTON: Mrs. Folger, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR FOLGER: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR FOLGER: Yes, I am.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR FOLGER: Yes.

MR. MILTON: Would you give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR FOLGER: Yes.

MR. MILTON: Mr. Brown, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR BROWN: No.

MR. MILTON: Is the standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

[1946] PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Irrespective of any feeling you might have to sympathize with him or anything like that?

PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Can you give this case your best effort, your full attention and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR BROWN: That would be difficult.

MR. MILTON: What do you mean, sir?

PROSPECTIVE JUROR BROWN: Because of my other responsibilities I have. I have mentioned that I am in a graduate research program and I have a timetable in that. That would be drawing my attention also.

MR. MILTON: Let me ask you this, Mr. Brown. We predicted an outside limit of like six months in the beginning. What if I were to tell you it would be substantially shorter than that? Would that affect your opinion at all?

PROSPECTIVE JUROR BROWN: By opinion, do you mean my willingness to be a juror?

MR. MILTON: Yes, or your ability to fairly—

PROSPECTIVE JUROR BROWN: Yes, it would affect it.

MR. MILTON: So the shorter the time then, the less pressed you would be?

PROSPECTIVE JUROR BROWN: Yes, yes.

MR. MILTON: You would give this case your full attention?

[1947] PROSPECTIVE JUROR BROWN: Yes.

MR. MILTON: Mr. Alexander, you think you understand what your function would be as a trial juror if you are selected to hear this case?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: Are you willing to apply the standard of proof, proof beyond a reasonable doubt?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR ALEXANDER: Yes.

MR. MILTON: Mr. Khan, the standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Would you find the defendant guilty of these murders if you believed beyond a reasonable doubt that he was guilty of them?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Is there any question in your mind about that?

PROSPECTIVE JUROR KHAN: No.

MR. MILTON: On the other hand, and I am not trying to suggest by the questions anything, but on the other hand if the people failed to meet that burden, you'd have to find him not guilty, right?

[1948] PROSPECTIVE JUROR KHAN: Yeah.

MR. MILTON: The people meet the burden, you'd have to find him guilty?

PROSPECTIVE JUROR KHAN: The evidence proves him guilty, I will find him guilty. If not, I won't.

MR. MILTON: Can you give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR KHAN: Yes.

MR. MILTON: Can you think of any reason why you would not be suitable for this type of a case, Mr. Khan?

PROSPECTIVE JUROR KHAN: No.

MR. MILTON: Mrs. Fintz?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: Same question. The standard of proof. Are you willing to apply it in this case?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: You think you understand your function as a trial juror?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that the defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR FINTZ: Yes.

MR. MILTON: Mrs. Camberos, have you ever heard the standard of proof before, proof beyond a reasonable doubt?

PROSPECTIVE JUROR CAMBEROS: Yes.

[1949] MR. MILTON: Before coming to court?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: Did you read about it in the juror's handbook?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: Some other source?

PROSPECTIVE JUROR CAMBEROS: Yes, from other jury rooms I have been in.

MR. MILTON: The court read the instruction to you again yeseterday and he will read it again at the conclusion of this case. Do you think you have some idea as to what that means?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: Proof beyond a reasonable doubt?

PROSPECTIVE JUROR CAMBEROS: I understand.

MR. MILTON: So you understand it fully, you believe?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR CAMBEROS: Yes.

MR. MILTON: If, at the conclusion of this case, and I want you to think about it, if at the conclusion of this case you believed beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR CAMBEROS: Yes, I would.

MR. MILTON: Do you have any question about your [1950] function as a trial juror?

PROSPECTIVE JUROR CAMBEROS: No.

MR. MILTON: That's Miss Burtenshaw?

PROSPECTIVE JUROR BURTENSHAW: Uh-huh.

MR. MILTON: Miss Burtenshaw, do you have any question about your function as a trial juror?

PROSPECTIVE JUROR BURTENSHAW: No, I don't.

MR. MILTON: Are you willing to give this case your full attention, your best effort and carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR BURTENSHAW: Yes, I will.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR BURTENSHAW: Yes.

MR. MILTON: You are not sitting there thinking that you have a leaning a certain way because of certain things suggested by questions by counsel, do you?

PROSPECTIVE JUROR BURTENSHAW: No.

MR. MILTON: The fact that there is a lot of questions about two of them and one of me and I am a boy and they are grown and things like that—

MR. APPLEBAUM: I object to that, Your Honor. There has been no mention of that whatsoever. Mr. Milton's a grown man with children.

THE COURT: Overruled.

MR. MILTON: Mrs. Burtenshaw, the fact of the [1951] matter is if you are persuaded beyond a reasonable doubt that this defendant committed these murders, you'd find him guilty, wouldn't you?

PROSPECTIVE JUROR BURTENSHAW: Definitely.

MR. MILTON: Mr. Torzon, the standard of proof, prove beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR TORZON: Yes, I am.

MR. MILTON: Are you willing to follow His Honor's instructions absolutely?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: Will you, to the best of your ability, carefully analyze the facts of this case and apply the law that the judge gives you to those facts?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: If, at the conclusion of this case, you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR TORZON: Yes.

MR. MILTON: That's Miss Yonekura?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: The standard of proof. Do you think you understand that proof beyond a reasonable doubt?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: You willing to apply it in this case?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: If, at the conclusion of this case, [1952] you are persuaded beyond a reasonable doubt that the defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR YONEKURA: Yes.

MR. MILTON: Mr. Arangio, do you have any questions regarding your function as a trial juror?

PROSPECTIVE JUROR ARANGIO: No, sir.

MR. MILTON: How about your suitability?

PROSPECTIVE JUROR ARANGIO: No, sir.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply it in this case?

PROSPECTIVE JUROR ARANGIO: Yes, I am.

MR. MILTON: If you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR ARANGIO: Yes, I would.

MR. MILTON: Pass for cause.

THE COURT: Except for the hearing at bench, do the defense pass for cause?

MR. APPLEBAUM: Yes, Your Honor.

MS. KOPPLE: Yes.

THE COURT: Peremptory is with the people.

MR. MILTON: People would like to thank and excuse juror number 7 Mrs. Lopez.

THE COURT: Mrs. Lopez, thank you very much for coming. You are excused. Please report back to the jury assembly room. And they will tell you what's next.

* * * *

[1963] PROSPECTIVE JUROR SEGOVIA: Right. All things can be taken into account, right.

MR. APPLEBAUM: We talked a lot about burdens of proof and reasonable doubt. And I think you have a pretty good feel for what we're talking about at this point.

But invariably what happens is after the case is over, a juror will come out and say gee, you didn't prove your client was innocent. And I wonder if I am talking to a wall sometimes, you know, not saying that here, but you just wonder about that.

You have any feelings about that that somehow the defense really has to prove anything to you?

PROSPECTIVE JUROR SEGOVIA: No. You don't have to prove to me that he is innocent. I understand that. As it stands now, he is.

MR. APPLEBAUM: Okay. You understand we're not starting out on equal footing here in the sense of right now?

PROSPECTIVE JUROR SEGOVIA: Then you—

MR. APPLEBAUM: The defense and the prosecution.

PROSPECTIVE JUROR SEGOVIA: Okay.

MR. APPLEBAUM: There is a presumption, the defense starts out with a presumption?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: The prosecution can whittle that away and then fill up their own side of proof beyond a reasonable doubt. You would accept that, certainly?

PROSPECTIVE JUROR SEGOVIA: Yes.

[1964] MR. APPLEBAUM: Fair enough?

PROSPECTIVE JUROR SEGOVIA: Fair enough.

MR. APPLEBAUM: You agree with what I stated when I said we don't start equally?

PROSPECTIVE JUROR SEGOVIA: Okay. I agree with it now.

MR. APPLEBAUM: People do sometimes hold some people to different standards. We talk about whether Mr. Sandoval will testify or not. You feel that you can hold his testimony to the same standard as any other witness in terms of evaluating him as if he does testify?

PROSPECTIVE JUROR SEGOVIA: Sure.

MR. APPLEBAUM: Now you have to evaluate bias. He is the guy sitting over here on trial. That's a bias, right?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: Let's talk real talk here. That's something you would consider, I am sure, wouldn't you?

PROSPECTIVE JUROR SEGOVIA: Yes.

MR. APPLEBAUM: Would you also consider if other witnesses testify in terms of biases that they have? Awards that they might be getting or reasons that they might have for fabricating?

PROSPECTIVE JUROR SEGOVIA: I can appreciate that also, yes.

MR. APPLEBAUM: Could you, I don't know, consider revenge even as a motive that a witness might have for fabricating something?

[1965] PROSPECTIVE JUROR SEGOVIA: Possible.

MR. APPLEBAUM: Now we talk about prosecution burden of proving things and you recall Mrs. Kopple talking about each and every element of the charge. Crimes are made up of component parts as we define them in the penal code, okay?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: And then there is also the other component part who did it?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: You agree that the prosecution has the burden of proving each and every one of those component parts beyond a reasonable doubt, right?

PROSPECTIVE JUROR SEGOVIA: I do.

MR. APPLEBAUM: There are in terms of defenses. Sometimes an act will occur and we all agree that it occurred, okay?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: It can be an excusable. Can you consider if the court instructs you that sometimes things are excusable or justifiable? Could you consider those types of instructions, and even though you know something occurred, take into account that it might be justified?

PROSPECTIVE JUROR SEGOVIA: Yes.

MR. APPLEBAUM: You wouldn't preclude that?

PROSPECTIVE JUROR SEGOVIA: Right.

MR. APPLEBAUM: Depends on what's said and how it's said?

* * * *

[2042] Do I presume that you didn't write no because you didn't know any of them or—

PROSPECTIVE JUROR JURAS: I don't know any of them.

MS. KOPPLE: Fine.

Do you have any difficulty with this presumption of innocence that as you sit there now Mr. Sandoval is presumed innocent?

PROSPECTIVE JUROR JURAS: I presume him to be innocent.

MS. KOPPLE: And you believe that right now?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Now do you understand that that presumption is something that is kind of surrounding him and it's cloking him throughout this trial into the jury room into your deliberations?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Do you understand that?

PROSPECTIVE JUROR JURAS: I understand that.

MS. KOPPLE: Will you agree to follow that concept?

PROSPECTIVE JUROR JURAS: Yes, I agree.

MS. KOPPLE: And will you require the district attorney in this case to meet his burden of proof, if he can do so?

PROSPECTIVE JUROR JURAS: I will require him to do so.

MS. KOPPLE: All right. And I want you to understand, do you accept the proposition that all you may hear in this case is from this side of the table and from [2043] cross-examination by us. That's a likely possibility?

PROSPECTIVE JUROR JURAS: Yes, I understand that.

MS. KOPPLE: And are you going to somehow despite the fact that you might want to hear what's over here on the other side of the table, are you going to hold it against Mr. Sandoval if you don't hear from him?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: You have never been on jury duty, right?

PROSPECTIVE JUROR JURAS: No, I never have.

MS. KOPPLE: I take it that you are the sort of person who will speak up and voice her opinion in front of other people?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: Is that a fair assumption?

PROSPECTIVE JUROR JURAS: That's a fair assumption.

MS. KOPPLE: And if you were on a jury deliberating and there were eleven people screaming at you that you were unreasonable and et cetera, et cetera and they were all going the other way, whichever way it was, are you the sort of person who will change over to get along with the group or if you really believed you are really correct in your opinion, what would you do?

PROSPECTIVE JUROR JURAS: If I had not been convinced to a moral certainty of the defendant's guilt, I would hang firm. And conversely, if I had been convinced that he were guilty, I would hang firm then, too.

MS. KOPPLE: Okay. Do you have any idea or any [2044] concept that you came into this courthouse with that if a prosecutor calls a witness that that witness must by the very nature of being called by the prosecutor have some extra air or credibility about him?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: Do you agree to judge all the witnesses by the same scale?

PROSPECTIVE JUROR JURAS: Yes.

MS. KOPPLE: If, for example, at the end of the prosecutor's case he rests, and then you hear us rest and then you have to go into the jury room and you know that there must be something more that you want to hear. You just have a gut feeling that maybe he is involved. Maybe he did it, but you didn't hear something to really convince you beyond a reasonable doubt and to a moral

certainty. Are you going to let that gut feeling or that intuition take over or will you require the rules of the court to be met?

PROSPECTIVE JUROR JURAS: I would require that the rules of the court be met and follow the judge's instructions. If I hadn't heard conclusive evidence, I couldn't find somebody guilty.

MS. KOPPLE: So you don't know anything about this case, do you?

PROSPECTIVE JUROR JURAS: No.

MS. KOPPLE: You could go either way depending on the evidence, right?

PROSPECTIVE JUROR JURAS: Right.

* * * *

[2047] MS. KOPPLE: But if you were ordered to do so as a juror and there were some photographs which may or may not occur in this, case would you be able to follow your duty as a juror and to look at the evidence?

PROSPECTIVE JUROR DONNELLY: Yes.

MS. KOPPLE: Is there anything about any of the questions that I have been asking or Mr. Milton had asked or Mr. Applebaum that lit up some light bulb in your head and said, you know, where you would like to ask a question or make a comment? Anything that was appropriate to you?

PROSPECTIVE JUROR DONNELLY: I don't think so. My answers would have been the same as most of these people.

MS. KOPPLE: And do you have any difficulty with this concept of reasonable doubt?

PROSPECTIVE JUROR DONNELLY: No.

MS. KOPPLE: Presumption of reasonable doubt?

PROSPECTIVE JUROR DONNELLY: No.

MS. KOPPLE: Do you think that there should be any difference, a different, say, burden on the prosecution when the charges get more serious? Like this type of case?

PROSPECTIVE JUROR DONNELLY: Yes, I think so.

MS. KOPPLE: Now when I ask that, in other words, there is a burden of proving a case beyond a reasonable doubt and to a moral certainty in each and every criminal case. That is the general burden the prosecutor has. You understand that?

PROSPECTIVE JUROR DONNELLY: Yes.

* * * *

[2056] MS. KOPPLE: Any reading or any stories in the paper that you might have read about it, that you can recall?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: You also did not answer yes or no on the names. It's just blanks. Did you know any of the names of any of the witnesses who were called or questioned?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: And if you had a choice to be here or not to be here as juror in this case, you did mark yes, that you would prefer to be here. Did you have any particular reason?

PROSPECTIVE JUROR MOORE: Just that I work at the Post Office and they do a lot of overtime during December. So I wanted to get out of overtime.

MS. KOPPLE: That's fair enough. I just want to know the answer. We get all kinds of responses, and I just want to know your answer.

Now would you have any difficulty in requiring the prosecutor to meet the burden of proof as prescribed by law?

In other words, to prove the truth of these charges beyond a reasonable doubt and to a moral certainty? Would you have any difficulty in doing that?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: And what if the following were to happen. Supposing he presents whatever he has. I don't [2057] know how many witnesses he will present or what

evidence he will present right now. But let's say there comes a time when he says the people rest and then Mr. Applebaum or I get up and say guess what? The defense rests. We decide to rest upon the state of his evidence.

Are you going to come in there with some kind of anything feeling that you didn't hear from the other side of the table and therefore you are going to convict?

PROSPECTIVE JUROR MOORE: No.

MS. KOPPLE: If, after he rested and we rested, you were not convinced beyond a reasonable doubt and to a moral certainty in your heart, would you be able to vote not guilty?

PROSPECTIVE JUROR MOORE: Yes.

MS. KOPPLE: Even though you might want to hear what Mr. Sandoval has to say, you accept the proposition that in many criminal cases you don't hear from the defendant?

PROSPECTIVE JUROR MOORE: Yes.

MS. KOPPLE: Since you would be here and not at the Post Office and you know that you get out at 2:30 every day, is there anything that would be pressing you to, say, come in with a quicker verdict or to press you for time if you were deliberating in the jury room?

PROSPECTIVE JUROR MOORE: No.

* * * *

[2207] MS. KOPPLE: When you look at Mr. Sandoval right now, do you think you can tell whether he is guilty or innocent?

PROSPECTIVE JUROR HARTNETT: No, I can't. Well, I presume he is innocent.

MS. KOPPLE: But just factually speaking, you look at him you don't know, do you?

PROSPECTIVE JUROR HARTNETT: No.

MS. KOPPLE: Now when we talk about the presumption of innocence, that's a legal presumption that everyone, including you and everyone else in this room has that you are legally presumed to be innocent until the contrary is proven beyond a reasonable doubt and to

a moral certainty. Does that sound appropriate to you or not appropriate?

PROSPECTIVE JUROR HARTNETT: That sounds appropriate.

MS. KOPPLE: So you don't have any difficulty with that concept?

PROSPECTIVE JUROR HARTNETT: No, I don't.

MS. KOPPLE: It seems I—well, you have been on jury duty several times in criminal cases, so I suppose you have heard about the burden of the prosecutor by me, Mr. Applebaum and in your other cases as well, correct?

PROSPECTIVE JUROR HARTNETT: Yes.

[2208] MS. KOPPLE: Do you think that there is anything wrong or unfair or too hard for this would be a one way street, that the ball is in Mr. Milton's court solely and that if he can't prove the truth of these charges, then you must come in with an acquittal?

PROSPECTIVE JUROR HARTNETT: No, I don't.

MS. KOPPLE: And will you be able to do that if that's what happens?

PROSPECTIVE JUROR HARTNETT: Yes, I can.

MS. KOPPLE: Thank you.

Pass for cause.

THE COURT: MR. MILTON.

MR. MILTON: Thank you, Your Honor.

Good morning, Mrs. Hartnett. I am sure you have heard the question by Ms. Kopple repeatedly if the people put on a case and people rest and the defense says the defense rests, whether or not you could find the defendant not guilty if the people fail to sustain their burden of proof and most of the jurors correctly stated yes, they could find him not guilty.

Conversely, Miss Hartnett, would you agree that if the people put on a case and the people rest and the defense says the defense rests, if you are persuaded beyond a reasonable doubt that the defendant committed these offenses, you'd have to find him guilty; would you not?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: The standard of proof in a criminal [2209] case, proof beyond a reasonable doubt, do you think you understand what that means?

PROSPECTIVE JUROR HARTNETT: Yes, I do.

MR. MILTON: Are you willing to apply that standard in this case?

PROSPECTIVE JUROR HARTNETT: Yes.

MR. MILTON: If you are persuaded beyond a reasonable doubt that this defendant committed these murders, would you find him guilty of them?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: And that is independently of anyone else on the panel. Do you understand that?

PROSPECTIVE JUROR HARTNETT: Yes, I do.

MR. MILTON: Now Miss Hartnett, we don't mean to try to get you to think that well, they want a hung jury, something like that or stick to your guns no matter what the others say.

The court will instruct you with regard to your duty during deliberation. The fact that even if you commit yourself one way or the other, whatever that way is, if you believe at sometime during further deliberation that your position is incorrect, you'd change your mind.

If, on the other hand the others are unable to convince you your position was incorrect, you would remain with your position. Do you understand that?

PROSPECTIVE JUROR HARTNETT: Yes.

MR. MILTON: Miss Hartnett, if you are selected to hear this case, would you give this case your full [2210] attention and watch each witness that takes the stand and listen very carefully to what he or she has to say? And at the conclusion of this case, would you carefully analyze the facts of this case, you being the exclusive judges of the facts and apply the law that his honor gives you to those facts?

PROSPECTIVE JUROR HARTNETT: Yes, I would.

MR. MILTON: Miss Heintz, is there anything that you would like to discuss that we've discussed so far?

PROSPECTIVE JUROR HEINTZ: No.

MR. MILTON: The standard of proof, proof beyond a reasonable doubt, are you willing to apply that standard in this case?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: If, at the conclusion of this case you are persuaded beyond a reasonable doubt that the defendant committed these offenses, would you find him guilty?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: And that's whether the defense puts on a case or doesn't put on a case, whether the defendant testifies or doesn't testify. Your concern is whether or not the people have proven it beyond a reasonable doubt. Won't you agree?

PROSPECTIVE JUROR HEINTZ: Yes.

MR. MILTON: And if we do, you will find him guilty?

PROSPECTIVE JUROR HEINTZ: Yes.

* * * *

(CONFERENCE REGARDING INSTRUCTIONS)

* * * *

[5120] THE COURT: This is a discussion of the instructions. The record will reflect I have previously given counsel a list of the instructions that have been prepared by both sides. Some have been selected by me and some have been selected by counsel. I have given counsel a list and the order in which it looks like we should discuss the instructions.

MR. MILTON: I don't have the list.

MR. APPLEBAUM: I gave the Court the list back.

Your Honor, can I suggest this? We checked off the ones that there is no problem with both sides agreeing on. And perhaps the Court can just tell us, and also I wrote objections and who made the objection on the Court's list. So maybe the Court can just tell us because we don't have two lists. Mr. Milton didn't make a separate list.

THE COURT: I will, yes. Sort of generally conducting instructions and general statements of the law according to my list, counsel have agreed on 1.00, 1.01, 2.02, 1.10, 2.00.

We will discuss 2.01. Counsel have agreed on 2.02. Defendant objects to 2.05. You have agreed on 2.09. We will discuss 2.50.

You have agreed on the following: 2.11, 2.20, 2.13, 2.21, 2.23, 2.12, 2.22, 2.27, 2.25, 2.51, [5121] 2.52, 2.60, 2.61, 2.70.

Defendant has requested in addition to 2.70, 2.71 and we wiil discuss that.

You have both agreed on 2.72, 2.80, 2.81, 2.82, 2.90, 2.91, 4.50. There is a defendant's special instruction regarding, I believe it's alibi and burden of proof. We will discuss that.

All right. In the area of definitions of a crime, intents in that area, you have agreed on 8.00, 8.10, 8.11, 8.20, 8.30.

8.31 was one not requested by either side, but I included it in for discussion purposes and we will discuss that.

The people have objected to 8.37, 8.40, 8.42, 8.44, and 8.50. We will discuss those.

In addition, I have 8.52 and I have no check mark or indication about it, so I think we will discuss that. The same with 8.51. There is no noted objection on the paper. And—

MR. MILTON: It was withdrawn by the defense, I think.

THE COURT: Instruction was withdrawn?

MR. APPLEBAUM: Yes.

THE COURT: Okay. Let's mention that at the appropriate time.

There is agreement on 8.70 and 8.71. The people objected to 8.72. There is agreement on 8.73 and the people objected to 8.74. We will discuss 8.72 and

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(JURY INSTRUCTIONS GIVEN AT GUILT PHASE)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Dept. No. 116

No. A760386
RICHARD KALUSTIAN, Judge Presiding

PEOPLE OF THE STATE OF CALIFORNIA

vs.

SANDOVAL, ALFRED

Defendant

[Filed Feb. 23, 1987]

RESPECTIVE DUTIES OF JUDGE AND JURY

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence we come to that part of the trial where you are instructed on the applicable law.

You will have these instructions in their written form in the jury room for use during your deliverations.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform. One duty is to determine the facts of the case from the evidence received in the trial and not from any other source. The

word "fact" means something that is proved directly or circumstantially by the evidence [or by agreement of counsel]. Your other duty is to apply the rules of law that I state to you to the facts as you determine them and in this way to arrive at your verdict.

It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

As jurors you must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, or because he has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent.

* * * *

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

If any rule, direction or idea in these instructions [is] repeated or stated in varying ways, no emphasis [is] intended and you must not draw any inference because of its repetition. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions [are] given has no significance as to their relative importance.

STATEMENTS OF COUNSEL—EVIDENCE STRICKEN OUT—INSINUATIONS OF QUESTIONS—STIPULATED FACTS

Statements made by the attorneys during the trial are not evidence; [however, if counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved as to the party or parties making the stipulation].

A "stipulation" is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not guess what the answer might have been or as to the reason for the objection.

You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never heard of it.

MASCULINE FORM OF PRONOUN INCLUDES ALL PERSONS

For sake of convenience, the masculine pronoun is used in these instructions and applies equally to all persons.

DIRECT AND CIRCUMSTANTIAL EVIDENCE—INFERENCES

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact, without the necessity of an inference, and which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE TO PROVE SPECIFIC INTENT

The [specific intent] [or] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of any of the offenses charged unless the proved circumstances not only are consistent with the theory that he had the required [specific intent] [or] [mental state] but cannot be reconciled with any other rational conclusion.

Also, if the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to the absence of the [specific intent] [or] [mental state], it is your duty to adopt that interpertation which points to the absence of the [specific intent] [or] [mental state]. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be un-

reasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

EVIDENCE LIMITED AS TO PURPOSE

Certain evidence was admitted for a limited purpose.

At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted.

You are again instructed that you must not consider such evidence for any purpose except the limited purpose for which it was admitted.

PRODUCTION OF ALL AVAILABLE EVIDENCE NOT REQUIRED

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

CREDIBILITY OF WITNESS

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the giving of testimony;

[A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness;]

[An admission by the witness of untruthfulness;]

[The witness' prior conviction of a felony.]

PRIOR CONSISTENT OR INCONSISTENT STATEMENTS AS EVIDENCE

Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with his testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.

[If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him describing that event.]

WITNESS WILLFULLY FALSE— DISCREPANCIES IN TESTIMONY

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testi-

fied falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

CREDIBILITY OF WITNESS—CONVICTION OF A FELONY

The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

WEIGHING TRANSCRIPT TESTIMONY OF UNAVAILABLE WITNESS

In this case testimony given by a witness at a prior proceeding who was unavailable at this trial has been read to you from the reporter's transcript of that proceeding. You are to consider such testimony in the same light and in accordance with the same rules which you have been given as to testimony of witnesses who have testified here in court.

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not pro-

duce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

SUFFICIENCY OF TESTIMONY OF ONE WITNESS

Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact [required to be estabilshed by the prosecution] to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.

REFUSAL OF WITNESS TO TESTIFY—EXERCISE OF PRIVILEGE AGAINST SELF-INCRIMINATION

When a witness refuses to testify as to any matter, basing his refusal on the constitutional privilege against self-incrimination, you are not to draw from that fact any inference as to the credibility of the witness or as to the guilt or innocence of the defendant.

MOTIVE

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

FLIGHT AFTER CRIME

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

DEFENDANT NOT TESTIFYING—NO INFERENCE OF GUILT MAY BE DRAWN

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

DEFENDANT MAY RELY ON STATE OF EVIDENCE

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.

CONFESSION AND ADMISSION—DEFINED

A confession is a statement made by a defendant other than at his trial in which he has acknowledged his guilt of one or more of the crime(s) for which he is on trial. In order to constitute a confession, such a statement must acknowledge participation in the crime(s) as well as the required [criminal intent].

[A statement made by a defendant other than at his trial is not a confession but an admission whenever the

statement does not by itself acknowledge his guilt of one or more of the crime(s) for which he is on trial, but which tends to prove his guilt when considered with the rest of the evidence.]

You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

Evidence of an oral confession [or oral admission] of the defendant shou'd be viewed with caution.

CORPUS DELICTI MUST BE PROVED INDEPENDENT OF ADMISSION OR CONFESSION

No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession or] admission made by him outside of this trial.

The identity of the person who is alleged to have committed a crime is not an element of the crime [nor is the degree of the crime]. Such identity [or degree of the crime] may be established by an admission [or confession].

EXPERT TESTIMONY

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the

opinion. You may also consider the qualifications and credibility of the expert.

[In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.]

You are not bound to accept an expert opinion as conconclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

OPINION TESTIMONY OF LAY WITNESS

In determining the weight to be given to an opinion expressed by any witness [who did not testify as an expert witness], you should consider his credibility, the extent of his opportunity to perceive the matters upon which his opinion is based and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight, if any, to which you find it entitled.

CONCERNING HYPOTHETICAL QUESTIONS

In examining an expert witness, counsel may ask him a type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts, and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the probable or possible range of the evidence. It is for you, the jury, to find from all the evidence whether or not the facts assumed in a hypothetical

question have been proved, and if you should find that any assumption in such a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

PRESUMPTION OF INNOCENCE—REASONABLE DOUBT—BURDEN OF PROOF

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

BURDEN OF PROVING IDENTITY BASED SOLELY ON EYE WITNESSES

The burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the offense with which he is charged.

If after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find him not guilty.

ALIBI

The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged offense for which he is here on trial. If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

HOMICIDE—DEFINED

The word homicide means the killing of one human being by another, either lawfully or unlawfully. As used in these instructions, the word homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful.

MURDER—DEFINED

[Defendant is charged in [Counts 1-4 of] the information with the commission of the crime of murder, a violation of Section 187 of the Penal Code.]

The crime of murder is the unlawful killing of a human being with malice aforethought.

In order to prove the commission of the crime of murder, each of the following elements must be proved:

1. That a human being was killed,

2. That the killing was unlawful, and

3. That the killing [was done with malice aforethought].

"MALICE AFORETHOUGHT"—DEFINED

"Malice" may be either express or implied.

[Malice is express when there is manifested an intention unlawfully to kill a human being.]

[Malice is implied (1) [when the killing results from an intentional act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life] [or] (2) [when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life].]

[When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.]

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

DELIBERATE AND PREMEDITATED MURDER

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethough is murder of the first degree.

The word "willful," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon

pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder on the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

UNPREMEDITATED MURDER OF THE SECOND DEGREE

Murder of the second degree is the unlawful killing of a human being with malice aforethought when there is manifested an intention unlawfuly to kill a human being but the evidence is insufficient to establish deliberation and premeditation.

SECOND DEGREE MURDER—KILLING RESULTING FROM ACT DANGEROUS TO LIFE

Murder of the second degree is [also] the unlawful killing of a human being as the direct causal result of an intentional act, (1) [involving a high degree of probability

that it will result in death, which act is done for a base, antisocial purpose and with wanton disregard for human life.] [or] (2) [the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for human life.]

When the killing is the direct result of such an act, it is not necessary to establish that the defendant intended that his act would result in the death of a human being.

MANSLAUGHTER—DEFINED

The crime of manslaughter is the unlawful killing of a human being without malice aforethought.

VOLUNTARY MANSLAUGHTER—DEFINED

The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill.

There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].

In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved:

1. That a human being was killed,
2. That the killing was unlawful, and
3. That the killing was done with the intent to kill.

SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED

To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such character and degree as naturally would excite and arouse such passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable man faced with the same situation. The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED

If there was provocation, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed such provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

MURDER OR MANSLAUGHTER—COOLING PERIOD

To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of such quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused and sufficient time has elapsed for angry passion to end and for reason to control his conduct, it will no longer reduce an intentional killing to manslaughter. The question as to whether the cooling period has elapsed and reason has returned is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled his heat of passion and for his reason to have returned.

NO SPECIFIC EMOTION ALONE CONSTITUTES HEAT OF PASSION

Neither the emotion of fear, of itself, nor the emotion for revenge, of itself, nor the emotion induced by and accompanying or following an intent to commit a felony, of itself, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter which I have stated to you. Any or all of such specific emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness, but also any one or more of them may exist in the mind of a person who acts deliberately and from choice following his own reasoning howsoever good or bad it may be. Hence the law sets up the standard and requires the test that I previously have stated to you for determining whether or not the defendant acted under heat of passion.

MURDER AND MANSLAUGHTER DISTINGUISHED

The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.

When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury].

DUTY OF JURY AS TO DEGREE OF MURDER

Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine and state in your verdict whether you find the murder to be of the first or second degree.

DOUBT WHETHER FIRST OR SECOND DEGREE MURDER

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

DOUBT WHETHER MURDER OR MANSLAUGHTER

If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

UNANIMOUS AGREEMENT AS TO OFFENSE—FIRST OR SECOND DEGREE MURDER OR MANSLAUGHTER

Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of [murder of the first degree,] [or] [murder of the second degree,] [or] [voluntary] manslaughter.

EVIDENCE OF PROVOCATION MAY BE CONSIDERED IN DETERMINING DEGREE OF MURDER

When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and the jury finds that the killing was murder, they may consider the evidence of provocation for such bearing as it may have on the question whether the murder was of the first or second degree.

ATTEMPT—DEFINED

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.

Acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

In the crime of attempted murder, as charged in Count 5, malice must be express, that is, there must be manifested an intent to kill.

CONCURRENCE OF ACT AND MENTAL STATE AND/OR SPECIFIC INTENT

In each of the crimes charged in the information there must exist a union or joint operation of fact or conduct and a certain mental state and/or specific intent in the mind of the perpetrator and unless such mental state and/or specific intent exists, the crime to which it relates is not committed.

The mental state and/or specific intent for each crime is included in the instructions defining that crime.

RESISTING ATTEMPT TO COMMIT FELONY

Homicide is justifiable and not unlawful when committed by any person when resisting an attempt to commit a forcible and atrocious crime.

JUSTIFIABLE HOMICIDE IN SELF-DEFENSE

The killing of another person in self-defense is justifiable and not unlawful:

1. When the person who does the killing has reasonable ground to believe and does believe that there is imminent danger that the other person will kill him or cause him great bodily injury, and

2. A reasonable person under the same circumstances would believe that it was necessary to kill the other person to prevent death or great bodily injury to himself.

In order to justify killing another person in self-defense, actual danger or great bodily injury is not necessary. On the other hand, a bare fear of death or great bodily harm is not sufficient.

In order to justify a killing it must be established:

1. The circumstances must be sufficient to excite the fears of a reasonable person that there was imminent danger of death or great bodily injury, and

2. The party killing must have acted under the influence of such fears alone and under the belief that such killing was necessary to save himself from death or great bodily injury.

JUSTIFIABLE HOMICIDE—LAWFUL DEFENSE OF SELF OR ANOTHER

Homicide is justifiable and not unlawful when committed by any person in the defense of another if a reasonable man in a like situation would believe that the person killed intended to commit a forcible and atrocious crime and that there was imminent danger of such crime being accomplished. A person may act upon appearances whether such danger is real or merely apparent.

USE OF FORCE IN DEFENSE OF ANOTHER

It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another person to protect him from attack.

In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

SELF-DEFENSE AGAINST ASSAULT

It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

SELF-DEFENSE—ASSAILED PERSON NEED NOT RETREAT

A person who is threatened with an attack that justifies the exercise of the right of self-defense, need not retreat. In the exercise of his right of self-defense he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.

SELF-DEFENSE—ACTUAL DANGER NOT NECESSARY

Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer bodily injury, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether such danger is real or merely apparent.

HONEST BUT UNREASONABLE BELIEF IN NECESSITY TO DEFEND—MANSLAUGHTER

A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of manslaughter.

SELF-DEFENSE—WHEN DANGER CEASES

The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When such danger ceases to appear to exist, the right to use force in self-defense ends.

SELF-DEFENSE NOT AN EXCUSE AFTER ADVERSARY DISABLED

The right of self-defense ceases to exist when there is no longer any apparent danger of further violence on the part of an assailant. Thus where a person is attacked under circumstances which justify his exercise of the right of self-defense, and thereafter he uses such force upon his attacker as to render the attacker [apparently] incapable of inflicting further injuries, the law of self-defense then ceases to work in favor of the person attacked.

SELF-DEFENSE BY AN AGGRESSOR

The right of self-defense is not immediately available to a person who was originally an assailant, but such person must really and in good faith endeavor to decline further combat and fairly and clearly inform his adversary of his desire for peace and that he has abandoned the contest. After such steps have been taken, if his opponent continues the fight, the rights of the person who was the

original assailant, with respect to self-defense, are then the same as the rights of any person assailed by another.

PLEA OF SELF-DEFENSE MAY NOT BE CONTRIVED

The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

FINDING IF DEFENDANT PERSONALLY USED A FIREARM IN COMMISSION OF A FELONY

It is alleged [in all Count[s] that the defendant personally used a firearm during the commission of the crime[s] charged.

The word "firearm" includes [a gun.]

The term "used a firearm," as used in this instruction, means to display a firearm in a menacing manner, intentionally to fire it, or intentionally to strike or hit a human being with it.

If you find the defendant guilty of [one or more] of the crime[s] charged [or an attempt to commit the crime[s] charged] [or a lesser and included felony offense], it then will be your duty to find whether the defendant personally used a firearm in the commission of such felony.

FINDING IF DEFENDANT PERSONALLY USED A FIREARM IN COMMISSION OF A FELONY

The defendant may be found to have personally used a firearm during the commission of such felony, only if the proof shows beyond a reasonable doubt that such defendant personally used a firearm at such time.

You will include a finding on that question in your verdict, using a form that will be supplied for that purpose.

FINDING IF DEFENDANT INTENTIONALLY INFLICTED GREAT BODILY INJURY

It is charged [in Count 5] that in the [attempted] commission of the crime therein described the defendant, with the specific intent to inflict such injury, personally inflicted great bodily injury on [Manuel Torres].

If you find the defendant guilty of Count 5 it then will be your duty to determine whether or not the defendant, with the specific intent to inflict such injury, did personally inflict great bodily injury, as herein defined, on [Manuel Torres] in the commission of attempted murder or attempted manslaughter. The burden is on the People to prove this beyond a reasonable doubt.

The term "great bodily injury" as used in this instruction means a significant or substantial physical injury. Minor or moderate injuries of a temporary nature do not constitute great bodily injury within the meaning of this instruction.

You will include a finding on that question in your verdict, using a form that will be supplied for that purpose.

CALJIC 8.80 and 8.81.3 (Modified)

If you find the defendant in this case guilty of any count of first degree murder, you must then determine if the special circumstance charging him with multiple murder is true.

To find this special circumstance to be true you must find that, in addition to the first degree murder just referred to, the defendant was convicted in this trial of another murder. That other, or second, murder may be of the first or second degree.

A special circumstance must be proved beyond a reasonable doubt.

If you have a reasonable doubt as to whether a special circumstance is true, it is your duty to find that it is not true.

In order to find the special cricumstance charged in this case to be true or untrue, you must agree unanimously.

You will include in your verdict on a form that will be supplied your finding as to whether the special circumstance is or is not true.

SPECIAL CIRCUMSTANCES—JURY MUST NOT CONSIDER PENALTY

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstance charged in this case.

ALL INSTRUCTIONS NOT NECESSARILY APPLICABLE

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts.

SEVERAL COUNTS—DIFFERENT OCCURRENCES —JURY MUST FIND ON EACH

Each count charges a distinct offense. You must decide each count separately. The defendant may be found guilty or not guilty of [any or all] of the offenses charged. Your finding as to each count must be stated in a separate verdict.

JURY NOT TO TAKE CUE FROM THE JUDGE

I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any questions submitted to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

INDIVIDUAL OPINION REQUIRED—DUTY TO DELIBERATE

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

HOW JURORS SHOULD APPROACH THEIR TASK

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

MANNER OF RECORDING INSTRUCTIONS OF NO SIGNIFICANCE-CONTENT ONLY GOVERNS

The written instructions now being given will be made available in the jury room during your deliberations. They must not be defaced in any way.

You will find that the instructions may be either printed, typewritten or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

Every part of an instruction whether it is printed, typed or handwritten is of equal importance. You are to be governed only by the instruction in its final wording whether printed, typed or handwritten.

ADMONITION AGAINST DISCLOSURE OF JURY BALLOTING

You shall not disclose to anyone outside the jury, not even to the court or any member of its staff, either verbally or in writing, how you are divided numerically in your balloting as to the guilt or innocence of [the] defendant or as to [any] offense charged, until specifically directed so to do by the court.

USE OF MULTIPLE VERDICT FORMS

There are 4 possible verdicts as to count(s) 1 and 2.

There are 3 possible verdicts as to count(s) 3 and 4.

There are 3 possible verdicts as to count 5.

These various possible verdicts are set forth in the forms of verdict which you will receive. Only one of the possible verdicts may be returned by you [as to any particular count]. If you all have agreed upon one verdict [as to a particular count], the corresponding form is the only verdict form to be signed [as to that count]. The other forms are to be left unsigned.

CONCLUDING INSTRUCTION

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

* * * *

(EXCERPTS FROM COUNSELS' ARGUMENTS TO THE JURY)

DEFENSE COUNSEL ARGUMENT

Then we get into some legal concepts. We talked about during voir dire at the very beginning this whole concept of guilty, not guilty and not proven. Remember we talked about the Scottish system way back when, and how that applies in this case?

There is really just one question you have to ask yourself with regards to each and every charge in this case and each and every component part or element. And the question is do I have a doubt and is my doubt reasonable. And if the answer to both those questions is yes, then it's either not proven or not guilty. It doesn't matter. Not proven or not guilty are one in the same in our system and you have to treat it that way.

If you answer one of those questions no, then that means there is perhaps a conviction as to that count or something less in that count.

If it's a murder, for example, maybe a second degree murder as opposed to a first degree murder or manslaughter as opposed to a first or second degree if you do not have a doubt.

And if you do have a doubt, then you ask yourself is that doubt really reasonable. And if you say no, then that means there is a conviction. But that's the only real question you have ot ask yourself once you determine what the facts are.

In terms of the law, we have a homicide here in Belvedere Park. No if's, and's or but's about it, there is a homicide. There is a killing of two people. Question remains whether it's lawful or unlawful to find out what that homicide is. Is it murder in the first or second degree? Is it manslaughter or is it justifiable homicide? But there is no question there is a homicide.

There is also no question that Freddie did it. He shot these two kids. I call them kids because they are 18, 19 year old. There is no question that Fred shot them. It's a question of what the circumstances were surrounding the shooting. That's important.

And what you as reasonable people would consider, what is this homicide? Is it murder? If it is, what degree of murder is it? Is it a manslaughter or is it justifiable?

We know that murder, that a human being was killed, that the killing is unlawful as opposed to justified and it was done with malice aforethought.

Malice aforethought sounds like a foreboding term, but it's really not. It's just is there an intention manifest to kill. In other words, if a person intended in a cold, rational manner, let's say reloading the gun after shooting, there is no question in a situation like that you just shoot somebody reacting to a situation reload the gun and then start shooting again, you intend to kill them. That's malice. I mean, it's the obvious. Like being the herald of the obvious in that sense, but that's what malice is.

In order to have any type of murder, you have to have malice. The absence of malice, even though you may have a killing, would be manslaughter. Or if it's justifiable homicide, acting under self-defense or defense of others.

There is also the absence of malice. There is no murder in terms of the law. There is two separate ways to deal with the absence of malice. In fact, I think they wrote a book once or a movie, the absence of malice, and that's what it means. The important part of what is murder. Murder in the first and second degree both require malice. Malice aforethought.

In order to to have a first degree murder, requires premeditation and deliberation. And the judge read you an instruction with regards to premeditation and deliberation, and what does it mean?

Deliberation, deliberate means the result of careful thought, weighing the considerations both for and against doing the killing.

Now you have to put yourself in the shoes of Freddie Sandoval in that park at that night under those conditions with those same people. Was there time to weigh and consider for and against doing the murder? Did he have a chance to really deliberate? I mean, what does that tell us? Was it formed upon a pre-existing reflection as opposed to the sudden heat of passion or a condition precluding the idea of deliberation.

So this concept of heat of passion or sudden quarrel comes into play when you are analyzing when there was deliberation. So did he have a chance to weigh, to balance what he is doing or did things just happen? Was he the focus of this vortex of people? In a short time? Whether or not it was a cold calculated judgment.

Again, this whole concept of thinking through what you are going to do as opposed to just reacting to a situation. That's what sets aside first degree murder from second degree murder and manslaughter, this concept of premeditation and deliberation, a cold calculated judgment and decision. It can be arrived at in a short period of time, sure it can. But a mere unconsidered and rash impulse, even though there is an intent to kill is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

So it's more than just a yes or no kind of switch. Shoot, not shoot. Limbic lobe. Run, fight. You have to really weigh and consider and balance and go through that kind of thought. You have to balance the reasons for and against the choice of doing what you are doing, and having in mind the consequences of killing or not killing. That's what the law talks about.

And this isn't just made up, you know, last week. I mean, this is the distillation of certainly 800 years of Anglo American law from the time of Runnymead. And we know historically, it goes back way farther into Roman

times and even beyond into biblical times as to weighing and consideration.

So you have to ask yourself these questions. Has the prosecution shown you beyond a reasonable doubt that there was premeditation and deliberation with regards to these shootings in the park? And I think based on this evidence, the answer is no. There was no premeditation and deliberation. There was no careful reflection on the act. There was no time to balance and consider and weigh the consequences of the act.

Take the people's best case, forget the defense case for a second. Take the people's best case and drive to the park. There is a fight, a separate fight. Wolfie and Martinez and Aceves. What stopped them from getting into the car? Nothing. Why did they end up over here where the defendant was? Where Freddie Sandoval and Pelon were? It all happened very quickly. There was no time to premeditate and deliberate even in the people's best case.

Even if saying that Carlos Tostado was right in saying that the grabbing of them and shooting of them. Quick, sudden, rash, impulsive act even in that case.

And I am not suggesting for a second that that's actually what happened. It was much more involved than that. But even the people's best case, I am suggesting to you that the evidence shows no first degree murder with regards to what happened in Belvedere Park.

You have to then look at do I have a doubt and is my doubt reasonable with regards to premeditation and deliberation? If the answer is yes, okay. Then go down and see about second degree murder. And I am suggesting the answer is yes.

Murder of the second degree also is the killing with malice aforethought with the intent to kill. But the evidence is insufficient to establish deliberation and premeditation. Second degree, people's best case? Maybe, possibly. Possibly. Even the people's best case.

But you have to also look at the whole concept of one, heat of passion, sudden quarrel, to create the absence of malice or in a totally separate concept, legal concept from heat of passion and sudden quarrel where things come at you quickly and suddenly where you don't have time to think. You just react, defending yourself, defending another person from attack. You have an absolute right to do that. Totally separate concept, two different ways to create the absence of malice.

So you again ask yourself those questions. Do I have a doubt and is that doubt reasonable with regards to second degree murder? Which then would bring us to voluntary manslaughter, where there is an unlawful killing without malice.

Now you have to look at the without malice. The killing occurred upon a sudden quarrel or heat of passion or in the honest but unreasonable belief in the necessity to defend oneself or the another person. You have to think about that, defending yourself or another person. The absence of malice. And again, the sudden quarrel or your own fear, whether reasonable or unreasonable, as long as you have an honest belief that you are in fear in danger for your safety.

And we know the kind of cut that appeared here. Here is defense B. You didn't get this climbing over a wall or a fence. Described as a half inch deep cut. Put yourself in the shoes of Freddie Sandoval and Eugene Valenzuela in that situation. You think there was a fear? You think it was unreasonable maybe to shoot a person? Maybe. That's for you to decide.

But if it was an honest belief about the necessity to defend yourself then, even there it would be a manslaughter. If it was an honest and reasonable belief, then we're talking about justifiable homicide. These are the questions you must ask yourself.

So what do we mean by a sudden quarrel or heat of passion? Again, these rules that come down, the state of the law that you promised that you would consider and apply if you believe it applied to a set of facts.

This doesn't come overnight. These are still from centuries and centuries of thought, trial and error, and study of human beings and the way people live, the way people do things.

To reduce an intentional felonious homicide from murder to manslaughter upon the grounds of sudden quarrel or heat of passion, the provocation, the provocation must be of such character and degree as that naturally would excite and arouse such passion, and the assailant must act under the smart of that sudden quarrel or heat of passion.

Again, you don't have time to think. Things are just happening. This heat of passion to reduce a homicide to manslaughter, but it must be such a passion that would be naturally aroused in the minds of ordinary reasonable persons in the same situation or circumstances. That's you. That's why you are here. You are the ordinary reasonable people. The jury of peers. Members of our community.

What would you do in that situation? Under those circumstances? Under those conditions? So if that heat of passion who would arouse that feeling in you, it certainly would arouse it in Freddie Sandoval.

The question to be answered is whether or not at the time of the killing the reason of the accused was obscured or disturbed by the passion to such an extent that would cause again the ordinary reasonable person of average disposition to act rashly without deliberation and reflection and from such passion rather than from judgment.

So I think now we are starting to understand what we're really talking about. It's this concept of judgment, calculation and thought weighing back and forth. Would you have time, you as reasonable people, to go through that balancing process under these conditions? And then of course, the provocation has to be of such a nature to really arouse a passion. It can't be that. It's not that clearly. But it is this. You have reasonable doubts with regards to the degree of murder. If you just can't decide, you must give the benefit to Fred. That's the law. And

it's right. It's right. It's the individual against the entire power of the might and majesty of the State of California.

And the same is true with regards to if you have some doubts between murder and manslaughter, you must give the benefit of the doubt to the individual.

So how do we deal with this concept of malice aforethought? I mean, this is the mind set, the specific intent of the person there in the park. How do we determine what was going on in the mind?

And there is a rule of law that deals with it and it's circumstantial evidence. Remember I talked about this concept of tunnel vision? Tunnel vision cannot accept more than one interpretation of evidence.

Prosecutor has presented you with a picture that doesn't allow for any other rational conclusion. And what I am saying to you and what I think the evidence will suggest to you, in fact, even more than suggest to you, just flat out tell you is that there are several possibilities that are reasonable with regards to what the evidence is. Yeah.

Could have been intentional that he shot them in cold blood. That's one possibility based on the prosecution's best case without considering the defense, and the other is he was reacting to a situation. Those are both very reasonable interpretations.

So let's look at what the circumstantial evidence rule of law is and how you deal with it. You have to look at the totality of the circumstances, this whole concept of composites. The malice aforethought which is the specific intent that we're dealing with may be shown by the circumstances surrounding the commission of the act. The act is the shooting, the focus of the people coming in the park.

Now here is how it goes. Unless the proved circumstances not only are consistent with the theory that Freddie had the required malice aforethought or specific intent, but it cannot be reconciled with any other rational conclusion.

So look at all of the facts about what happened. Are there more than one rational conclusion that you can draw from these facts? If the evidence of this malice aforethought is susceptible of two reasonable interpretations, one of which points to the existence of malice aforethought and the other points to the absence of malice aforethought, it's your duty, your duty to adopt the one that points to the absence of malice. That's your oath. That's the law.

So you have to look at it. If there is an absence of malice, it's either manslaughter or justifiable homicide. Look at the total circumstances surrounding the act to make that determination. Don't wear blinders. Don't have tunnel vision. Weigh and consider. You will come up with clear light based on the photon packets that have been provided. Trust your instincts. Trust your common sense. Trust your intelligence. That's why you are here. So how do we decide really what these circumstances are? What do we have to look for?

Well, we have to look at what the witnesses tell us, and then we look at what the physical evidence is, and you have to decide. So in terms of dealing with witnesses, what do you look at? How do you decide if witnesses are telling you the truth either in whole or in part? And you can do that. You can assign anywhere from zero or up to a hundred percent for the credibility of any witness, any witness. How do you do that? Give you some guidelines. These are not frozen in stone, but these are kind of guidelines that the court read to you.

You can consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witnesses, including but not limited to—that's why I am saying it's not frozen in stone—the extent of the opportunity or ability of the witness to see or hear what they told you about.

Example. We talked about these pyramids up here, and the block wall dividers. You can't see through block wall dividers. You are only going to see glimpses in

certain perspectives. So witnesses have blinders, too, sometimes physical blinders where they can only see certain things and can't see something over here. Now if they mover over, they can see it. But that's something that you have to consider for each witness, the ability to perceive.

The ability for them to remember and communicate the matter that they are talking about. Some people are not very articulate; some people are. Some people are trained to testify; some people are not.

The character and quality of the testimony. I mean, you have to measure that. Their body language. Their demeanor, in other words.

The existence or nonexistence of a bias or motive. Well, some witnesses do have bias and motive. That has been suggested. You know, they are under the wing of the State.

Bennie Verduzco is being paid. He gets $600 bucks a month tax free, our money, till he finds a job. Sounds like to me after tax statements that he hasn't worked in a long time and probably is not going to. It's a bias. That's a motive for his act.

Tostado. He is getting protection. Somehow has planted in his mind he talked to the officers on the 16th and laid everything out, names, dates, times, how people were standing that in his mind he was now a snitch. And he was under the wing of the prosecutor, the prosecution. That's a bias. Those are things to consider.

The existence or nonexistence of any fact testified to by a witness.

The attitude of the witness towards the testimony that they are giving or the action that they are giving.

Previous statements that are consistent or inconsistent.

The admission of untruthfulness of a witness. And again, Bennie's an easy example. He flat out told you he did not take Pelon to his mother's. After his mom testifies, and I guess just no matter what you do, you are

not going to lie on your mom. I wouldn't. I can lie to you, lie to me, but he is not going to lie on his mom.

After his mother testified, he said, "Well, yeah, I did take him." An admission of untruthfulness. He told you he lied.

And then of course, the witnesses prior conviction of a felony. Why do they have a prior conviction of a felony? Because people who have felony convictions are not exactly your basic upstanding citizen of the communty. They have a history of being thieves and liars and not credible people.

So those are the things that you consider in determining the credibility of a witness. And that's your job. That's your focus.

How do you decide how much credibility to give, accepting some things, rejecting some things? Again, this composite view. You have to create clear light, or try to find clear light.

We know as part of human condition two people can see the same event and see it totally differently. That's one of the conditions of life, depending where you are standing, what you are doing at the time, your ability to see, that's a very common condition.

In the law that applies to that, failure of recollection is a common experience. People sometimes do forget some things, but that's why we ask questions to try and test that, to give you the opportunity to weigh and consider that.

Innocent misrecollection is not uncommon. People do make mistakes and misrecollect certain things. Happens all the time. In fact, two people witnessing again the same event or incident, transaction see it and here it differently, depending on perspective.

The real question is is the discrepancy with regards to something that's really important or something that's kind of trivial? And again, you have to look back at the time the observations were made to make that determination.

Now a person who is materially false, the prosecutor kept harping on that. Doctor Trockman was materially false. Look at the quality of the testimony. Think about what materially false is. A witness who is willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of that person or you might believe part of it and not believe part of it.

But what do they mean by a person who is false, willfully false in a material part? What does that mean? Well, we know again Bennie lying about his mom, and then having to come back and say no, because she testified because the defense brought her in. That's false, willfully false to a material point as opposed to just accusations. I mean, that's a specific example.

We have one witness who testified who wasn't here. Manuel Torres who died in a car accident or truck accident. It's hard to get the flavor of a person who is not physically testifying in front of you. You can't see him.

We had Sergeant Travis read that testimony without seeing the individual. Now you have to still take that testimony just like you would any other testimony and weigh it and consider it and decide. But it's a little more difficult really.

I mean, in truth and in fact, it's a little more difficult because you do not see the person. You don't know how they are acting or what they are doing at the time. But that's what you have to do. So it's a little different flavor, but you really have to try to apply that.

We all agreed when he started this back way back when during voir dire, you were telling us the truth that you would decide this case based only on the evidence that was presented to you, not other evidence. And the rule of law is that defendant Freddie can choose to rely on the state of the evidence and upon the failure, if any, of the people to prove beyond a reasonable doubt every essential element of the charge against him. And no lack of testimony on his part will supply a failure of proof by

the people as to support a finding against him on any such essential element.

The burden of proving the case is on the prosecution. I don't have to prove anything. We can rely on the state of the evidence and on the failure of the prosecution to have proved these charges beyond a reasonable doubt, and you must weigh and consider based only on what you heard, and promised that you will do that. I trust that you will do that. In fact, I have seen you long enough. I know you are going to do it.

Presumption of innocence. He is sitting right here before you. He is presumed to be innocent just like I am or you would or anybody would who is charged. And it goes right into the jury room with you.

The prosecutor has the burden of proof. And again, you have to look at this burden of proof and what is reasonable doubt. It's not a mere possible doubt. Anything can be possible. The moon could be made out of blue cheese, I guess. I guess not. We have been there. It cannot be.

So another planet could be made out of blue cheese. But that's really not in the realm of what we're talking about. What we're talking about is an abiding conviction to a moral certainty of the truth of the charge. I am not sure what that means exactly. I guess that you kind of know it when you see it. Do I have a doubt? Is that doubt reasonable? That is the question you have to ask.

And based on this case and based on this evidence, I don't think it's first degree murder under any theory, under any theory. What is it? What is it? Second degree murder? Manslaughter? Justifiable homicide? You have to make that determination. Person has a right to defend themselves from attack. Person has a right to defend another person, especially one standing right next to him from attack.

How do we analyze this whole concept of self-defense and defense of others? Again, it's a reasonable person

in the shoes of the accused, time of the incident. You are the reasonable people. And even if a person can act upon appearance of such danger whether it's real or apparent, and again, I am suggesting in this situation it's real. But even if it was just apparent, a person could act under those situations and the homicide would be justifiable and not unlawful.

And more importantly, the burden of proof with regards to whether or not the homicide was justifiable is on the prosecutor.

Let me read you this. Upon a trial of a charge of murder, it is a defense that the homicide was justifiable. In other words, in self defense or defense of others. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was not justifiable. If there is a reasonable doubt, I have a doubt reasonable whether the homicide was justfiable, the defendant is entitled to a judgment of acquittal. The question again now is reasonable. What is reasonable? How do you determine what's reasonable?

It's very difficult to step into the shoes of a person. Because we're looking at it in hindsight, in retrospect. Would be wonderful if we had a retrospectroscope we could go back and have a movie camera of every possible angle of this event and then we would know what is reasonable. But we're all limited, so we've got to try and figure out was Freddie's action reasonable. Yes? No? Okay.

Let's assume that you say no, that he overreacted to the situation. He overreacted to the situation. I mean, prosecutor talked about these guys small 5-7, 130 pounds, 105 pounds, that when it's focusing in and he shot, it was unreasonable. Okay. It's a possibility. That's a possibility.

But even if that belief is unreasonable, the other question, was it an honest belief? A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice.

It's again the absence of malice and therefore cannot be found guilty of murder. This would be so even though a reasonable man according to this man or woman in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of voluntary manslaughter. So even if the belief was unreasonable, he overreacted if it was an honest belief. I could get hurt. In fact, we know someone was hurt. It's an honest belief. Creates the absence of malice. It's a manslaughter. The other guidelines with regards to self-defense, what assault is, it's justifiable. Becomes justifiable when the person doing the killing has a reasonable ground to believe and does believe that there is imminent danger that the other person will kill him or cause great bodily injury and that it was necessary to kill the other person to prevent this great bodily injury or death.

Actual danger or great bodily injury is not these, the bare fear of death or great bodily injury is not sufficient, but in order to justify a killing, it must be established that the circumstances must be sufficient to excite the fears of a reasonable person that there was imminent danger or great bodily injury and the party killing must have acted under the influence of such fears alone and under the belief that such killing was necessary to save themselves from death or great bodily injury.

Those are questions that you have to ask yourself putting yourself in the shoes of Fred Sandoval on that early morning of October 14th. That's what you have to address yourself to.

The other things you have to address yourself to in deciding the reasonability of it, if somebody's coming at you with a knife and you don't know what the other people in fact have in their hands, and we will get into the facts later, it's dark, things are happening quickly. You just got out of your car. You are standing by your car. How

much force? What's the proper round of force? The law is that you can use all the force that's necessary, that's reasonably necessary to a reasonable person, including killing the other person, including killing the assailant. And you don't have to retreat. The prudent thing might have been to turn tail and run.

And you can say well, gee, I would have run in that situation. Okay. It's possible. But the law with regards to self-defense is that a person who is threatened with attack need not retreat. Can stand their ground and defend with all force necessary and the means that would appear necessary to a reasonable person in a similar situation.

The law applies, even though the assailed person might more easily have gained safety by flight or withdrawing from the scene. So again, here is an absolute right to stand your ground. And the same applies to the defense of another person. These rules apply to to self-defense and defense of another person.

The hard part is the hindsight. We are going to go try and put ourselves in Freddie's shoes. But you have to look at it when you are doing that what appeared to Fred Sandoval at that time and at that place or what would appear to you as reasonable people in his exact shoes, getting out of his car at that exact time. What would have appeared to you?

You have to consider again the factors of the time, of the speed of which things are happening, the lighting or lack of lighting, because we know from the officers that the lights in here were out. The only light that was functioning was the East Standard. These were dark. And it's almost 3 o'clock in the morning. The movements of people.

Again, people aren't frozen in stone. We have to put yourself in Freddie's shoes and consider the people are moving around. They are moving around very quickly. The number of people moving around. You know, how

do you keep track? The placement of people. And whether some of these people had drugs in their system and the effects that those drugs would have. That's a big, big factor, in fact.

The prosecutor has made a very, very big issue. Here is Big Fred.

Stand up for a second, Fred.

He is a big man. Big guy. Beefy guy. I am 6 feet, 192 pounds. I have lost a little weight since I was playing football.

Gilbert Martinez was what, 5-7, 135. Anthony Aceves was 5-6, 5-5, 105, whatever. How would these people attack a guy like him? The fact of the drugs. It happens every single day.

I clipped an article out of the LA Times because I thought I was going to argue yesterday and I didn't. But February 3, 1987—

MR. MILTON: There would be an objection to the article.

MR. APPLEBAUM: I can read articles.

THE COURT: Objection is sustained.

MR. APPLEBAUM: Every single day in the newspapers you will see person on PCP attacks police officers. You think size means anything to a person who is cooled out on PCP? Would you attack a police officer if you were in your right mind? I mean, officers wearing a baton? He is wearing a gun? Carrying stun guns? I wouldn't. Because you know you are going to get shot dead. That's the last thing you'd do.

And I don't care if you are Godzilla. You still wouldn't attack that police officer because he has got a gun. Every single day it happens. Person is loaded on PCP attacks police officer. Police officer shoots person. Person feels no pain and keeps coming. Officer shoots him again. Person feels no pain and keeps coming and police officer shoots him again and he is dead. Every single day in this community. That's sad. Because this drug is killing our youth.

The difference of this banquet last night of seeing youngsters who are doing well in school and doing well in sports and seeing the tragedy of these kids totally spaced out on PCP and it's night and day.

You think that David Martinez, I mean Gilbert Martinez and Anthony Aceves would attack Freddie Sandoval and Pelon? You bet they would. Because they had enough PCP in their system. They had no thought process to stop them. Just like the person who goes after the police officer with a gun in his hand. Size is meaningless.

Do I have a doubt and is that doubt reasonable? Going down the line to each and every charge and each and every element of each and every charge. Do I have an abiding conviction? This is what you ask yourself.

Reasonable doubt is the state of the case which after the entire comparison and consideration of all the evidence leaves your minds in the condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge. An abiding conviction, abide. To live with. Abode. Comes from the word "house." Abode. To live with. You live in your house.

Do I have an abiding conviction to a moral certainty of the truth of the charges? You have to think about when you go in, and do I have a doubt and is the reasonable, about what that means. Something that has to stay with you.

If you go in and vote on a conviction, let's say second degree murder, manslaughter, the park charges October 14th and next week or next month or even next year, you think you have been thinking about it on and off. You say, you know, I really do have a doubt. The more I think about it, I have a doubt. Reasonable doubt. You know, I have doubts about this case. Well, then it hasn't lived with you. The strength of your conviction to a moral certainty hasn't lived with you, an abiding conviction to a mortal certainty. That's what the standard is.

So when you go into the jury room, I suggest don't look at it just in the terms of here and now. Think about

over time. That's what the law is. So I am suggesting in terms of analizing the facts, once you determine what the facts are, start at first degree murder. Do I have a doubt? Is it reasonable?

Go to second degree. Do I have a doubt? Is it reasonable? Consideration now premeditation and deliberation and whether there is malice or the absence of malice. And with second degree, then consider heat of passion. Sudden quarrel. See if it goes to manslaughter.

Consider self-defense and defense of others and the reasonableness of that response. That's another way of second degree going on. Or if it's reasonable, then it becomes justifiable. Do I have a doubt. is that doubt reasonable?

Let's take a look at the facts of this case. There is really three categories of witnesses with regards to the Belvedere Park case, the October 14th case. People were actually in the park, eye witnesses. Some of them eye witnesses to more events than others. But actual witnesses in the park.

* * * *

DEFENSE COUNSEL ARGUMENT

If, after a consideration of all of the evidence, you have a reasonable doubt that the defendant was present at the time the crime was committed, he is entitled to an acquittal.

You have got that instruction. You will get it again in the jury room. You take that instruction and you look at that, along with the presumption of innocence and you have to come to this decision now as to whether the people met its burden of proof or not. Did they prove to you the truth of the charges beyond a reasonable doubt or not?

Now something else that I think was touched upon by Seymour that it's a decision when you say beyond a reasonable doubt and to a moral certainty. That means

forever. That doesn't mean just today or the mood you are in today. That means a decision that you are going to live with forever. And it's probably, if not the most important decision you will ever make, certainly way up there on the list. Now—

THE COURT: Ms. Kopple, would this be a good time to break?

MS. KOPPLE: Yes.

THE COURT: We will take lunch now until a quarter of one. In the meantime, don't discuss this case among yourselves or with anyone else or form or express an opinion until this matter is finally submitted to you.

See you back in your chairs ready to go quarter of one.

(Lunch recess.)

THE COURT: People versus Sandoval. Let the record reflect defendant is present with counsel; deputy district attorney is here. All the jurors and alternates are here.

You may continue, Ms. Kopple

MS. KOPPLE: Thank you, Your Honor.

Good afternoon.

There were a couple of points that I wanted to bring up to you before we go on further. Deputy Birtness and Deputy Caballero testified in the rebuttal case of the prosecution that they were assigned to keep Ralph Ortega's car under surveillance on November 1st.

The importance of their testimony is that Ralph wasn't in the car when they stopped the car, and when they kept it under surveillance. And you can be sure that if he were in that car, you would have heard it from them.

They were asked questions. Birtness was asked questions about whether, in fact, he was given the name by the prosecution or the detectives here was the name of the person Ralph Ortega. He said no, that name was not familiar to him.

The description of the male Latin who was, I think, 5 foot 8, something like that, 150, 160 who was driving the car was not the description of Ralph Ortega. Ralph

was bigger. He is over 6 feet. Weighed 210, something like that, very close in size to Freddie.

So Caballero, who is the female officer, followed his car over to a drive-in movie. And she finally gave up surveillance, could really add nothing more.

It's what they didn't add that's important. Ralph was not in that car. And the reason he wasn't in that car, his Monte Carlo, was because he was in the Camaro coming back from Tecate that weekend.

I could spend another hour or two or three going over each and everything that Ralph said that Sandra said that Terry said. You remember it. You heard. If there is anything more you need to hear, you are always able to get the testimony read back to you.

You were able to observe the credibility of these witnesses, and now it's in, the ball is in your court.

There were some things mentioned in the argument by the prosecution having to do with this photograph showing the attic at the Wells' house. And he said there was no proof that they were wholesale drug dealers. And so what if they were? It wouldn't even be relevant. Those were his words.

Well, I submit to you that it would be very relevant if they were dealing in dope because that would give a motive to many other people to want to have killed Ray Wells.

MR. MILTON: There is an objection.

THE COURT: Overruled.

MS. KOPPLE: That is a factor for you to consider when you take the pieces of evidence about what the police found and what they lost or didn't keep track of from the Wells' home. And that's something that you have to make a determination of, bearing in mind that Freddie Sandoval does not have to prove to you nor do I nor does Seymour Applebaum have to prove to you who did the killings.

The prosecution is the one who has to prove to you beyond a reasonable doubt who is guilty of these charges. And if he can't do it because he doesn't have the evidence,

then you have no choice but to vote for an acquittal. It is not up to either side or not up to the defense to show you who, in fact, it was. I can't say to you it was Bennie or Sal Rubio or some disgruntled customer. It could have been anybody.

But the evidence does not support the proposition that Freddie did it, and that's a matter for your determination. But that is the evidence as I view it.

Now there is another instruction, one of the important instructions that the judge read to you and that you heard a definition of, a confession and an admission and what it is. And it's very clear from the instruction as to what is a definition of a confession or an admission.

But it says you are the exclusive judges as to whether the defendant made a confession and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

Now there is another very important paragraph down here. Sorry for those on the end, but I will read it.

Evidence of an oral confession or oral admission of the defendant should be viewed with caution. There is a reason this paragraph is here. The people who wrote this instruction of law had people like Bennie Verduzco in mind. Think about it.

This case leans or falls, it falls within Bennie Verduzco's testimony. Because without him, they don't have a case.

Just so you don't think that this is the only time in history that this ever happens, it is a matter of common knowledge. And in this society and in the western world, unfortunately if we see the television, we hear the news, we read the newspapers, people aren't perfect. Human beings are not perfect. The world is not perfect. We don't all operate like a computer, and mistakes are made and false testimony is had, and innocent people are wrongfully convicted.

* * * *

MS. KOPPLE: I think to anyone who reads the newspaper, sees the news on television, watches shows like 60 Minutes where they do investigative reporting that we are all familiar with cases in which, for various reasons, innocent men get convicted of crimes, murder, robbery, all sorts of crimes.

I think that probably a couple of the more famous cases and that have even come to mind more recently is an engineer in Texas named Lenell Geter. They made a movie about him last week, and this was on television. This was a man who had testimony about being other places other than the crime and he was convicted. Eventually, this matter was resolved.

There are all kinds of cases where informants testify. They are later found to be telling lies. People are convicted. They are prosecuting witnesses like in the very well known Gary Datson case from Lima, Ohio where the woman testified that he was the rapist and the man went to prison. And we saw this on the news. We saw them on television after she recanted. Everybody knows about those cases.

The point that I am trying to make is to be careful and to be aware, to really pay attention and to be aware of what's going on here because you have got a man like Bennie Verduzco upon whom the prosecution is resting its case.

This is a decision that you are going to have to live with forever. And when you are back there in the jury room, you are going to have all those instructions and all the testimony and all the bits of phsyical evidence.

You will have the little blue mouse costume or the little blue rat costume. You can check. You can see it's hand made.

The photo of Freddie and John Walters and Sandra down in Tecate. You will have the little slip of paper with his name and these DMV papers which have Betty Phipps name on them, but they don't have anything connecting Alfred Sandoval to that car, to those papers.

It's like Seymour Applebaum told you before. He said just keep examining your doubt. Say "do I have a doubt and is it reasonable?" Because down the road a few weeks from now, a month from now, you are going to be having this conversation with someone close to you. You are going to be relaying probably some of your feelings, your thoughts, your views on the evidence and how this case proceeded through the trial court, what your impression was of the case and how you viewed the evidence.

And you are going to, by that time have made up your mind as to the reasonable doubt and as to the presumption of innocence and as to whether or not the prosecution's made its case. That is going to be a factor that's in your hands now.

And Freddie Sandoval thanks you, Seymour thanks you, and I thank you.

* * * *

DISTRICT ATTORNEY ARGUMENT

There is that instruction that's always a struggle, proof beyond a reasonable doubt. People have to prove it. It's read to you all the time. And whatever explains it beyond that.

And I have another story that might help you there. Might help you with proof beyond a reasonable doubt. I will make it a short one.

This is about a farmer who has been accused of adding water to his milk. One of the villagers went to the sheriff and said, "sheriff, farmer John is adding water to his milk."

Proof beyond a reasonable doubt? Of course not. But the sheriff decides, "Well, I have to do something about this allegation. I have to investigate this to see if there is any basis for it."

So the sheriff goes out to farmer John's farm and he takes up a position of surveillance. And he looks in the barn area and he sees the door open and he sees farmer John come out of the barn with one of those milk cans.

You know, the old metal milk cans about this high with the round top and the handles up here the top and along base? He saw farmer John carrying one of those out of the barn and put it up on his truck. And he saw farmer John go back into the barn, disappear. Presumably cows are in there. Comes back with another milk can and puts it up on the truck. And he does that a number of times, and he has got a bunch of them on the truck.

He sees farmer John get in the truck and drive off toward town. And this is market day and market day to sell the milk.

And the sheriff says, "I don't see anything unusual about that. There are cows in the barn. He loads the cans of milk on the truck and he is going to town to sell his milk."

The the sheriff sees farmer John's truck stop by the creek. And he sees farmer John get out of the truck and go around to the back of the truck, take one of the cans off of the back of the truck and walk down the creek bank. And now all we can see is this part of farmer John because the bank is hidden by the bottom part of him. He is lower down by the water.

He knows farmer John is holding the can. And he sees farmer John bend down like this and go out of sight and come back up and then walks back up and put the can back on the truck.

Proof beyond a reasonable doubt farmer John is adding water to the milk? It's awfully suspicious, but maybe not proof beyond a reasonable doubt. So the sheriff decides to follow farmer John into town. And he now sees farmer John about to sell his milk to people. And he walks over to farmer John's truck and he inspects the cans and they are all wet because he saw him do this to every can when he was at the creek, bend down and bring it up, put it back on the truck, and they are wet.

Proof beyond a reasonable doubt that farmer John is adding water to the milk? Again, awfully suspicious, but maybe farmer John was washing the excess milk off the outside of the can so he can sell them.

Well, the sheriff takes one of the cans of milk off the truck, sits it down. He looks in the can and he sees bubbles like maybe something was added to it. Proof beyond a reasonable doubt that he is adding water to the milk? Well, maybe that was from the turbulence the truck drives over.

He looks in the can and sees some separation. Maybe that's the cream of the milk separation.

He looks in the can again. Fish in the can. Proof beyond a reasonable doubt? You betcha. You betcha.

Plug it in here. What do we have here? Look at the physical evidence in the park. The blood trail, the blood comparisons. The casings, the bodies, where they were positioned, the '68 Chevy Caprice, Frank Bender, the DMV switch, Verduzco, the motive to kill.

Read that motive instruction. The motive to kill Ray and Marleen, the motive to kill Ray and then a separate motive to kill Marleen. "I did her, too, because she saw me. I did him because he is a big mouth. I sent them to heaven with the angels."

That motive to kill. You know what? The defendant left a trail of evidence.

* * * *

(REASONABLE DOUBT INSTRUCTIONS GIVEN AT PENALTY PHASE)

CALJIC 2.90 (Modified)

As to any crime or criminal act of which defendant is accused as a factor in aggravation, he is presumed innocent until the contrary is proved beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of any crime or criminal acts of which defendant is accused used an an aggravating factor.

CALJIC 8.84.1.1 (1983 New)

Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crime of assault with intent to commit murder prior to the offense of murder in the first degree of which he has been found guilty in this case.

Before you may consider such alleged crime as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of such prior crime. You may not consider any evidence of any other crime as an aggravating circumstance.

CALJIC 8.84.1.2 (Modified)

Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence:

1) Exhibiting a firearm in a rude, angry or threatening manner in the immediate presence of Deputy Sheriff Randall Prestwich, a peace officer, in violation of Section 417(b) of the Penal Code and

2) Assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury on Guy Walker in violation of Section 245(a)(1) of the Penal Code, or

3) Battery with the infliction of serious bodily injury on Guy Walker in violation of Section 243(d) of the Penal Code.

Violations of Penal Code sections 245(a)(1) and 243(d) are different statements of the same act—the alleged assault on Guy Walker in the County Jail—and can constitute only one factor in aggravation.

Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. You may not consider any evidence of any other criminal acts as an aggravating circumstance.

SUPREME COURT OF CALIFORNIA

[No. S004765, Crim. No. 26405, Dec. 14, 1992.]

THE PEOPLE,
Plaintiff and Respondent,

v.

ALFRED ARTHUR SANDOVAL,
Defendant and Appellant.

SUMMARY

Defendant was convicted of four counts of first degree murder (Pen. Code, § 187), with a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), and one count of attempted murder (Pen. Code, §§ 187, 664). The jury also found that defendant had personally used a firearm in the commission of each offense (Pen. Code, § 12022.5). Defendant had fatally shot two men and had wounded another man during a gang-related confrontation in a park, and had fatally shot a man and a woman in their home approximately two weeks later. The jury returned a verdict of death for the murder of the woman, and verdicts of life imprisonment without possibility of parole for the murders of the three men. (Superior Court of Los Angeles County, No. A760386, Richard P. Kalustian, Judge.)

The Supreme Court affirmed the judgment. As to guilt phase issues, the court held that the trial court did not err in denying defendant's motion to sever, in admitting evidence of defendant's gang affiliation, or in excluding evidence of the alleged culpability of third parties. The court also held that defendant's prior conviction of as-

sault with intent to commit murder was properly admitted for impeachment, and that the trial court properly refused to rule, in advance of defendant's testimony, on his request to limit the scope of cross-examination. The court further held that the prosecutor did not commit misconduct in cross-examining a defense expert as to his bias and suggesting to the jury that the expert was a liar, but that the prosecutor did engage in nonprejudicial misconduct by denigrating defense counsel during closing argument.

As to the penalty phase, the court held that the prosecutor did not improperly cross-examine a defense witness concerning defendant's gang membership, and that the trial court did not err in refusing to give defendant's proposed instruction that age could be considered only as a mitigating factor. The prosecutor did not engage in misconduct, the court held, when he argued the effect of defendant's crimes on the victims and their families, but did engage in nonprejudicial misconduct by paraphrasing a biblical passage in support of the death penalty. The court further held that the trial court did not abuse its discretion in refusing to declare a mistrial due to jury deadlock, or in requiring a separate penalty verdict as to each murder victim. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J.)

OPINION

PANELLI, J.—Defendant was convicted by a jury in the Los Angeles County Superior Court of four counts of first degree murder (Pen. Code, § 187)[1] with a multiple-murder special-circumstance finding (§ 190.2, subd.(a)(3)), and one count of attempted murder (§§ 664/187). The jury also found that defendant personally used a firearm in the commission of each offense (§ 12022.5).

[1] All statutory references hereafter are to the Penal Code unless otherwise indicated.

The jury returned a verdict of death as to the conviction of murder of Marlene Wells and verdicts of life without possibility of parole as to the convictions of murder of Gilbert Martinez, Anthony Aceves, and Ray Wells. The appeal is automatic. (§ 1239, subd. (b).)

Guilt Phase Facts

Prosecution Case

1. *Belvedere Park Murders.*

About 2:30 a.m. on October 14, 1984, Adela Rodriguez and a group of girls(Zebba, Susie, Dianne, Corine, and Yvonne), along with Gilbert Martinez and Manuel Torres, drove to Belvedere Park in East Los Angeles. Anthony Aceves and a man named Jack drove to the park in another car. Once there, the group broke up into couples. Adela walked off with Gilbert Martinez.

Adela and Gilbert started walking back to the car after Zebba called for them to return. A fight was about to start near the car between people Adela did not know. As Adela was getting in the car, Gilbert said, "Let me get my friends first." As Gilbert approached his friends, Adela saw defendant shoot Gilbert in the head at close range. Defendant also shot Anthony in the head, and he shot at Manuel as the latter ran away. Defendant turned and pointed the gun at Adela and her friend Susie. Susie backed the car out, and drove off. Defendant's car followed them for a short distance. The girls then returned to the park to check on their friends. Gilbert died in Adela's arms.

Susie Martinez testified that she drove Adela and the others to Belvedere Park on October 14, 1984. She walked around the park with Anthony Aceves until they were called back to the car. When they arrived at the car, she saw Carlos Tostado fighting with someone. The fight stopped, and she noticed defendant standing next to a brown Monte Carlo arguing or talking with Anthony.

Gilbert was nearby. Defendant pulled out a gun and shot Gilbert and Anthony in the head. After Gilbert fell to the ground, defendant shot him again. Susie did not see Gilbert or Anthony with any weapons, nor did she see them make any aggressive gestures.

Carlos Tostado testified that he drove a white Monte Carlo to Belvedere Park on October 14, 1984. Several friends were with him. Another car drove up with four young women and three men. Tostado fought with one of the men. As the fight was breaking up, defendant, also known as "Chato," and Eugene Valenzuela, also known as "Pelon," drove up in a tan Monte Carlo. Defendant got out of the car, grabbed one of the men by the neck and shot him. Tostado had known defendant for about 10 years and was a member of the same gang, Arizona Marivilla. The victims belong to a different gang, Mariana Marivilla.

Tostado admitted that he had lied to the police when he gave them statements on October 14, October 16, and December 12, 1984. He acknowledged that he was on probation for using phencyclidine (PCP) at the time of his testimony.

The prosecution read the preliminary hearing testimony of Manuel Torres, who had since died in an unrelated auto accident. He had gone to Belvedere Park in Susie's car with Gilbert Martinez and several young women. As they were getting into the car to leave, Gilbert stopped to talk to a group of people. Anthony Aceves left the car to "back up" Gilbert. Torres heard shots and saw Anthony fall to the ground. He himself was shot in the neck, but he did not see who shot him.

Deputy Sheriff Woodrow West went to Belvedere Park around 4 a.m. to investigate the shootings. He found a small pocket knife on the ground near the spot where Anthony Aceves had fallen. There were traces of blood on the knife. Deputy West also found five expended .22-caliber bullet casings.

Autopsies performed on the bodies of Gilbert Martinez and Anthony Aceves revealed that both alcohol (.09 percent) and PCP (.033 micrograms per milliliter) were found in Martinez's blood and that PCP (.042 micrograms per milliliter) was detected in Aceves's liver tissue. Since Aceves died three days after the shooting, the PCP levels in his liver and blood would have been higher at the time of the shooting.

2. *Wells Murders.*

Benjamin Verduzco had known defendant for about 16 years and had been a fellow member of Arizona Marivilla, but Verduzco no longer belonged. He agreed to testify in exchange for release from prison. He was placed in a protection program, given $600 a month for room and board, and was promised a name change.

On October 15 or 16, 1984, defendant asked Verduzco to keep a beige and brown Monte Carlo in his garage because he was in some kind of trouble. Verduzco agreed. Defendant left the car in Verduzco's garage and drove off with Eugene Valenzuela in a 1969 black Chevrolet Impala.

A week later, on October 24, 1984, defendant came to Verduzco's home. Ray and Marlene Wells arrived a few minutes later. Defendant asked to borrow $5 from Ray Wells and then left. That night, the police came to Verduzco's house and seized defendant's car.

On October 31, 1984, at 12:42 a.m., Frank Bender heard gunshots. He went to the front door of his house and looked across the street to the residence of Ray and Marlene Wells. He noticed that the Wellses' dog appeared frightened. He also saw a black 1968 Chevrolet Caprice parked nearby with the engine running.[2] Shortly there-

[2] Bender, who is a car buff, first told police it was a Chevrolet Impala. He determined it was a Chevrolet Caprice after examining a book of cars. The only difference between an Impala and a

after, he saw a silhouette cross the Wells yard and drive away in the car.

That same night, between 1 and 2 a.m., defendant called Benjamin Verduzco and said, "Bennie, I just did the big mouth in." When Verduzco asked, "Who," defendant said, "Remember the one who was there in the morning with the car." He referred to him as "R" and did not use a name. Defendant also said, "You know I take care of business. I had to do her, too." Defendant killed "her" because she saw him "do R." Defendant said, "They have gone to heaven with the angels." Defendant said he did it so that "they wouldn't be snitching no more."

Deputy Sheriff Robert Havercroft went to the Wells residence on the night of the murders. The rear door of the house was closed but not locked. He found Ray Wells's body on a couch in the living room and Marlene's body in the doorway between the dining room and kitchen. Deputy Havercroft found no evidence of theft, and no signs of forced entry.

Deputy Havercroft found three appointment books with many names and addresses. Attached to one of the appointment books were small pieces of paper. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other.

Betty Phipps sold a 1968 Chevrolet Caprice to defendant in October 1984. The car was not in running condition; defendant told her he was going to fix it up. On October 7, 1984, a black 1968 Chevrolet Caprice was stolen from the Los Angeles zoo. The stolen 1968 Chevrolet Caprice was stopped at the United States-Mexico border at Tecate on December 15, 1984, while Salvador Rubio, a member of the Arizona Marivilla gang, was

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Caprice was that the Caprice had chrome strips. He remembered the car because it was in excellent shape.

driving it. The license plate and vehicle identification numbers that were on the car did not belong to the car. One of the documents found in the glove compartment was a "pink slip" or ownership certificate with the name of Betty Phipps on the back.

Defense Case

1. *Belvedere Park Murders.*

The defense presented evidence from law enforcement officers and others regarding inconsistent statements given by Adela Rodriguez and the other young women on the night of the shootings. Zebba Rodriguez testified that when she was walking back to the car she saw Gilbert Martinez, Anthony Aceves, and Manuel Torres arguing with about three other men. She was afraid, got in the car, heard shots, and ducked until she heard no more shots. When she raised her head, she saw Gilbert and Anthony lying on the ground. She did not see who had done the shooting.

David Martinez testified that he went to Belvedere Park on the night of the shooting with Carlos Tostado. He and Tostado had spent the day cruising, drinking beer and smoking PCP.

Dr. Griffith Thomas, a pathologist, testified that PCP can cause very bizarre and aggressive behavior. The amount of PCP in the victims' bodies would correlate with bizarre behavior. Dr. Donald Trockman, a forensic psychiatrist, testified that persons with amounts of PCP in their systems such as the victims showed were "unpredictable people" and that they "may attack you and try to kill you."

2. *Wells Murders.*

Detective Gene Hetzel interviewed Benjamin Verduzco on November 1, 1984. When he told Verduzco that the Wellses had been murdered, Verduzco appeared surprised

and shocked. Verduzco did not mention that he had received a phone call from defendant on the night of the murders. He did not tell police about the phone call until much later.

Ralph Ortega testified that he went to a ranch in Tecate, Mexico with defendant and several other people on October 24, 1984. Artega went back to Los Angeles and returned to Tecate with his wife and children on October 30, 1984. Defendant was still there. The next evening, October 31, Halloween, defendant and some others took Ortega's son trick-or-treating.

GUILT PHASE CONTENTIONS

1. *Denial of Motion to Sever Counts.*

Defendant contends that the trial court erred in denying his motion to sever the Belvedere Park murders from the Wells murders. He argued for severance on the basis that the incidents were unrelated, not cross-admissible, and that the evidence in the Wells charges was far weaker than that in the Belvedere Park charges. The court denied severance based on the prosecutor's representation that Benjamin Verduzco would testify at trial and provide evidence of defendant's motive and premeditation concerning the Wells murders that linked them with the Belvedere Park murders.

Defendant renewed his motion to sever shortly before trial was scheduled to begin. The trial court denied the motion, again in reliance on the prosecutor's representation about Verduzco's anticipated testimony.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts . . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be

tried separately or divided into two or more groups and each of said groups tried separately. . . ."

The statutory requirements for joinder were met here because both incidents involved the same class of crimes —murder. Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. (*People* v. *Johnson*, (1988) 47 Cal.3d 576, 587 [253 Cal.Rptr. 710, 764 P.2d 1087].) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People* v. *Bean* (1988) 46 Cal.3d 919, 938 [251 Cal. Rptr. 467, 760 P.2d 996].)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reivewing a motion to sever trial." (*Frank* v. *Superior Court* (1989) 48 Cal.3d 632, 639 [257 Cal.Rptr. 550 770 P.2d 1119].) Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns it into a capital case. (*Ibid.*; see also *Williams* v. *Superior Court* (1984) 36 Cal.3d 447, 453 [204 Cal.Rptr. 700, 683 P.2d 699].)

Defendant bases his argument for prejudice primarily on the absence of cross-admissibility of the two sets of offenses. He argues that the trial court's reasoning did not establish that the evidence of the two separate incidents would have been admissible in its entirety had there been separate trials. According to defendant, all it es-

tablished was that there would have been some minor evidentiary crossover as to the two incidents. However, even if defendant is correct on this point, it is now clear tht cross admissibility is not the sine qua non of joint trials. (*People* v. *Mason* (1991) 52 Cal.3d 909, 934 [277 Cal.Rptr. 166, 802 P.2d 950]; *Frank* v. *Superior Court*, *supra*, 48 Cal.3d at p. 641; *People* v. *Poggi* (1988) 45 Cal.3d 306, 321 [246 Cal.Rptr. 886, 753 P.2d 1082].) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People* v. *Mason*, *supra*, 52 Cal.3d at p. 934.) "That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice." (*People* v. *Bean*, *supra*, 46 Cal.3d at p. 939).

Defendant did not carry that burden. The potential prejudice he asserted did not rise to the level of demonstrating that the court's denial of severance was an abuse of discretion. The court recognized that the anticipated testimony by Verduzco added significantly to the strength of the Wells case, thereby obviating the danger of a "spillover" effect from the Belvedere Park evidence. Indeed, the court suggested that it would reconsider the severance motion if the prosecution were not able to secure Verduzco's testimony. The inflammatory effect of defendant's gang membership as to the Belvedere Park case was neutralized by the fact that the victims were also gang members. Moreover, this was not a case in which capital charges resulted solely from the joinder of the two incidents. (Cf. *Williams* v. *Superior Court*, *supra*, 36 Cal.3d at p. 454.)

Defendant also made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one incident but not the other. Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. " 'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' " (*U.S.* v. *Archer* (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts " 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " (*Ibid.*; quoting *Baker* v. *United States* (D.C. Cir. (1968) 401 F.2d 958, 977 [131 App.D.C. 7]; see also *United States* v. *Valentine* (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. (*United States* v. *Valentine*, *supra*, 706 F.2d at p. 291.)

Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance.

Because the issue is raised on appeal following trial, we must also consider whether, "despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law." (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 590.) Defendant claims gross un-

fairness occurred as a result of the destruction of his ability to testify as to one incident but not as to the other. He has done no more, however, than make a bald assertion to that effect. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (*Id.* at p. 591.) We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial.

2. *Use of Peremptory Challenges.*

Defendant contends that the trial court erred in permitting the prosecutor to systematically exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed some scruples about imposition of the death penalty. Defendant acknowledges that we have addressed this contention on numerous occasions and have found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty. (See, e.g., *People* v. *Caro* (1988) 46 Cal.3d 1035, 1061 [251 Cal. Rptr. 757, 761 P.2d 680]; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 799 [248 Cal.Rptr. 126, 755 P.2d 310].) Accordingly, we reject defendant's contention.

3. *Evidence of Defendant's Gang Membership.*

Defendant contends that the trial court erred in admitting evidence of his gang membership because it was irrelevant and prejudicial to his defense. Defendant objected pretrial by moving to preclude the prosecutor from referring to his alleged gang membership during opening statements. The prosecutor argued that evidence of gang membership was relevant to prove the motive for the murders at Belvedere Park. The trial court ruled that the prosecutor had made a showing that the evidence was admissible and denied the motion.

Defendant later moved to strike the testimony of Carlos Tostado and Benjamin Verduzco on the ground

that the prosecutor had used them to put irrelevant and prejudicial testimony before the jury of defendant's alleged gang membership. The trial court denied the motion, ruling that the gang membership evidence had not caused undue prejudice.

Defendant argues that the evidence of gang membership was irrelevant and that the prosecutor never proved a gang-related motive for the shootings. We do not agree. The evidence established that the victims were members of a rival gang. The fact that the gangs purportedly had been at peace for seven years does not eliminate gang retaliation as a motive. Indeed, that appears to have been the only plausible motive. What we have here is a battle over turf. The Arizona Marivilla gang considered Belvedere Park to be its territory. The victims, members of a rival gang, were in Arizona Marivilla territory and were shot by a member of the Arizona gang without any other provocation.

Defendant argues that evidence of gang membership was found to be prejudicial and irrelevant in *People* v. *Cardenas* (1982) 31 Cal.3d 897 [184 Cal.Rptr. 165, 647 P.2d 569] and *People* v. *Perez* (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619]. However, here, unlike *Cardenas* and *Perez*, the evidence was far more relevant. In *Cardenas* the prosecution introduced evidence of gang membership to prove bias of defense witnesses, but bias had already been established by other testimony. We held that the admission of gang membership evidence was an abuse of discretion under Evidence Code section 352 because the evidence was of minimal probative value, cumulative, and extremely prejudicial. In *Perez*, the evidence of gang membership had no relevance to any issue at trial. In this case, the court did not err in the admission of gang affiliation.

4. *Exclusion of Evidence of Third Party Culpability.*

Defendant contends that the trial court improperly excluded, pursuant to Evidence Code section 352, evidence of third party culpability as to the Wells murders. We find no abuse of the court's discretion to exclude such evidence.

Deputy Havercroft found a daily appointment book and two weekly planners at the Wells residence. The books contained many names and addresses. Two small pieces of paper were clipped to the daily appointment book. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other piece of paper. Defendant's nickname is "Chato."

The defense sought to prove that Ray Wells was the center of a violent criminal operation involving drugs and stolen cars and guns, and that any number of criminal accomplices or rivals could have killed him. Therefore, the defense sought to cross-examine Deputy Havercroft about the names found in the appointment book and weekly planners and to introduce those documents into evidence. After considerable argument and an offer of proof, the court ruled that the evidence was inadmissible because "it still does not point the finger at any individual nor does it rise at all above possible ground of suspicion."

A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People* v. *Hall* (1986) 41 Cal.3d 826, 833 [226 Cal. Rptr. 112, 718 P.2d 99].)

The trial court properly found defendant's showing insufficient. The defense had no evidence of another person's actual motive to commit the crimes. Instead, the defense merely raised the possibility that others had a motive to kill Ray and Marlene Wells. Although the defense identified two persons with plausible motives, they had no direct or circumstantial evidence linking them to actual perpetration of the crimes.

The present case is similar to *People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [25 Cal.Rptr. 586, 766 P.2d 1], where the defense sought to introduce evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime. We affirmed the trial court's ruling that the evidence was inadmissible. It did not identify a possible suspect other than the defendant or link any third person to commission of the crime, or even establish an actual motive rather than a possible or potential motive.

Defendant's reliance on *Crane* v. *Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142] is misplaced. That case bears no similarity to the facts of the present case. *Crane* involved the exclusion of testimony regarding the circumstances surrounding the taking of the defendant's confession. The Supreme Court held that the ruling had denied the defendant a fair opportunity to present a defense.

As an additional basis for admission of this evidence defendant argues that the evidence was admissible pursuant to Evidence Code section 356. That argument is also unavailing. Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence . . . any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Contrary to defendant's contention, Evidence Code section 356 did not require admission of the appointment book and weekly planners. Those books simply were not part of a writing given in evidence by the prosecution. While the prosecution introduced independent slips of paper that were clipped to the appointment book, the book and the weekly planners themselves were unnecessary to an understanding of the slips of paper.

5. *Admissibility of Prior Conviction for Impeachment.*

Defendant contends that the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes. We do not agree. The court followed the analysis set forth in *People* v. *Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111], interpreting article I, section 28, subdivision (f) of the California Constitution, which was enacted as part of Proposition 8 in 1982. It properly concluded that defendant's reliance on pre-*Castro* cases was not determinative and that defendant's conviction for assault with intent to commit murder involved moral turpitude. (*People* v. *Olmedo* (1985) 167 Cal.App.3d 1085, 1097-1098 [213 Cal.Rptr. 742].) The court then exercised its discretion under Evidence Code section 352, concluding that the probative value outweighed the prejudicial effect. The court noted that it could not assess the impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. Contrary to defendant's contention, the court did not state that an offer of proof was required and, indeed, noted that California law did not then require an offer of proof.[3] Because of the similarity

[3] We have since held that testimony by the defendant is a prerequisite to appellate review. (*People* v. *Collins* (1986) 42 Cal.3d 378, 383 [228 Cal.Rptr. 899, 722 P.2d 173].) The ruling here preceded our holding in *Collins*, which was to be applied prospectively only.

of the prior to one of the charged crimes, the court offered to sanitize the prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so. (See *People* v. *Massey* (1987) 192 Cal.App.3d 819, 825 [237 Cal.Rptr. 734].)

Defendant's reliance on pre-*Castro* and Proposition 8 cases is unpersuasive. As we noted in *People* v. *Castro*, *supra*, 38 Cal.3d at page 312, the intention of the drafters of Proposition 8 was to "restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion" which had been grafted onto the code by our decisions. Accordingly, we find no abuse of discretion in the trial court's ruling.

6. *Request for Ruling in Advance on Scope of Cross-examination of Defendant.*

Defendant contends that the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Belvedere Park murders violated his right to testify on his own behalf.

Before the defense rested its case, defense counsel told the court that defendant wished to testify about the Belvedere Park incident on October 14, 1984, but that he did not wish to testify about the Wells murders on October 31, 1984. Counsel asked the court to limit any cross-examination of defendant to the Belvedere Park charges. Counsel indicated that defendant would testify on the issue of self-defense but gave no further details as an offer of proof. Defense counsel argued that the two incidents were entirely separate and that the direct and cross-examination could therefore be limited to the Belvedere Park charges. The prosecution disagreed, asserting that there was evidentiary spillover regarding defendant's efforts to hide the beige and brown Monte Carlo in Verduzco's garage and Ray Well's apparent knowledge of the transaction. The trial court refused to make a ruling in advance of defendant's actual testimony, stating

"whether a defendant can effectively limit the cross-examination depends upon the direct examination and may not be known until he testifies. The law is that a defendant cannot artificially limit the cross-examination and direct examination."

Defendant has failed to show that the court's ruling was erroneous. None of the authorities cited is directly on point, and none would have required the ruling sought here. Indeed, there is authority supportive of the trial court's action. (See *People* v. *Keenan* (1988) 46 Cal.3d 478, 410-513 [250 Cal.Rptr. 550, 758 P.2d 1081]; *People* v. *Williams* (1988) 44 Cal.3d 883, 912-913 [245 Cal.Rptr. 336, 751 P.2d 395].) The court acted well within its discretion.

7. *Cross-examination of Dr. Trockman.*

Dr. Donald Trockman, a forensic psychiatrist, testified as an expert witness for the defense in support of the self-defense claim as to the Belvedere Park counts. Dr. Trockman testified that there was a high correlation between ingestion of PCP and unpredictable violence and hostility. Based on his review of the autopsy report of Gilbert Martinez showing bruises and high levels of PCP and alcohol in his blood, Dr. Trockman concluded that at the time of his death, Martinez was in an angry, aggressive, violent mood. He could not reach any specific conclusion as to the mood of Anthony Aceves because he had lived for three days after the shooting.

On cross-examination Dr. Trockman testified that the mental state reached under the influence of alcohol is different from the mental state reached under the influence of PCP. The prosecutor reminded the doctor that he had testified differently in previous cases where the person was charged with being under the influence of PCP and asked the doctor whether his answer was dependent on his function in the particular case.

The prosecutor asked Dr. Trockman if Gilbert Martinez was in a violently aggressive mood during his entire period of PCP intoxication, and was told: "The important time. The time when he confronted the accused in this case." The prosecutor then asked how he knew the victim had confronted the accused and whether the defense had told him what he had to accomplish to dispel the prosecution case.

The prosecutor also asked Dr. Trockman whether, by his testimony, he tries to affect the outcome of a case. The prosecutor queried whether the witness instructed attorneys on the questions they should ask for dramatic effect, to maintain the interest of the jury, and to dispel inferences of defense bias.

During closing argument the prosecutor referred to the doctor's admission that he had testified differently in other cases about the distinction between alcohol and PCP intoxication. Based on the admission the prosecutor stated that the doctor "is a liar."

Defendant contends that the prosecutor committed prejudicial misconduct in so questioning the doctor and in calling him a liar during closing argument. Although defendant objected to the questions on cross-examination, he raised no objection during argument to the prosecutor's use of the term "liar." Defendant has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition. (*People* v. *Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].)

In any event, there was no prosecutorial misconduct. The prosecutor was entitled to question the doctor's testimonial consistency and possible bias. (*People* v. *Meneley* (1972) 29 Cal.App.3d 41, 60 [105 Cal.Rptr. 432].) Referring to testimony as "lies" is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief.

(*People* v. *Edelbacher, supra,* 57 Cal.3d 983, 1030.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence. In this case, the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument. (*Ibid.*)

Defendant's reliance on *People* v. *McGreen* (1980) 107 Cal.App.3d 504 [166 Cal.Rptr. 360] (overruled on other grounds in *People* v. *Wolcott* (1983) 34 Cal.3d 92 [192 Cal.Rptr. 748, 665 P.2d 520]) is misplaced. In *McGreen,* the prosecutor attempted to discredit the expert witness by showing that he had received B and C grades in graduate school and that the witness's membership in certain scientific societies was a sham. The trial court eventually foreclosed further cross-examination on these grounds. The prosecutor nevertheless persisted in the line of questioning and additionally asserted that the witness's testimony had been stricken in another case because it was "patently unbelievable." When asked for authority to support the admission of such evidence of the witness's "unbelievability," the prosecutor admitted he had none. Additionally, during argument the prosecutor suggested there had been an ethics investigation of the witness and characterized the witness as an habitual liar who prostituted his credentials for $50 an hour. (*Id.* at pp. 514-517.)

In no way was the cross-examination in this case comparable to that in *McGreen.* Here, the prosecutor elicited testimony tending to show bias by questioning the witness about his contrary testimony in previous cases and his interest in helping the defense. Such cross-examination was proper. (See *People* v. *Rich* (1988) 45 Cal.3d 1036, 1088 [248 Cal.Rptr. 510, 755 P.2d 960].)

8. *Cross-examination of Ralph Ortega.*

Defendant contends the prosecutor committed multiple instances of prejudicial misconduct during the cross-

examination of Ralph Ortega, defendant's alibi witness in the Wells case.

Ralph Ortega testified for the defense that he went with defendant, Eugene Valenzuela, and others to a small ranch in Tecate, Mexico on October 24, 1984. He testified further that he stayed four days and returned to Los Angeles while defendant remained at the ranch. Defendant was still there when Ortega returned around midnight on October 30. They stayed on at the ranch; defendant went with Ortega the next night, Halloween eve, to take Ortega's son trick-or-treating.

On cross-examination the prosecutor elicited from Ortega that he had been arrested about 5:45 a.m. on October 24, 1984, near the Mexican border. He established that Ortega was not released from custody until about 5 p.m. that evening. The prosecutor noted that this information had not been revealed during Ortega's testimony on direct examination and asked Ortega if defense counsel had tried to avoid this subject. The prosecutor made references to Ortega's decision to "fess up" because "I was on to you" and asked if defense counsel had explained to him that it was necessary to put defendant in Tecate around 10 or 11 a.m. on October 24. The prosecutor established that Ortega and his friends just "hung around" the ranch. The prosecutor also established that Ortega purchased and delivered food and supplies to defendant and Valenzuela during their entire stay in Tecate.

The prosecutor asked Ortega if counsel had explained to him that he would be liable as an accessory after the fact if he ever admitted that he knew that defendant had committed the Belvedere Park murders at the time he took defendant to Tecate. Ortega said no and denied any knowledge that defendant was involved.

Later, when questioning Ortega about his knowledge of the seizure of the 1968 Chevrolet Caprice at the border,

the prosecutor stated: "Are you going to stop your lying here in court?" Defense counsel objected to the prosecutor's yelling, but not to the question itself.

Defendant contends that the prosecutor committed misconduct by repeatedly suggesting that defense counsel had colluded with Ortega in the fabrication of Ortega's alibi testimony. In our view, the record, as described above, does not support the assertion. Moreover, defendant has waived the point by failing to object and request a timely admonition. (*People* v. *Green, supra,* 27 Cal.3d at p. 27.)

Defendant also claims that the prosecutor used his cross-examination of Ortega to express his own personal disbelief in Ortega's testimony. Defendant refers to the questions suggesting that Ortega was lying. Again, no objection was raised below, and the point is therefore waived since any harm could have been cured by a prompt admonition. (*People* v. *Green, supra,* 27 Cal.3d at p. 28.)

Defendant asserts that the prosecutor improperly tried to impeach Ortega with evidence of a drug arrest. Ortega was arrested as an accessory to murder in this case, but he was released from custody after one day and charges were never filed. When questioning Ortega about his arrest in this case, the prosecutor queried, "You were also arrested for something else, weren't you?" Defense counsel's objection was *sustained.* No admonition was requested or given. Under these circumstances, we fail to see how defendant could have been prejudiced by this question since the jury was already aware that Ortega had been arrested on the way to Tecate for possession of methamphetamines. Moreover, the jury was given the standard instruction (CALJIC No. 1.02) stating that a question is not evidence and that they should not guess what the answer might have been when an objection is sustained.

Defendant also contends that the prosecutor improperly questioned Ortega about his failure to volunteer his exculpatory information to the police prior to trial. Defendant asserts that the prosecutor was aware that Ortega had been arrested as an accessory and had exercised his constitutional right to remain silent. Indeed, Ortega explained that he had never told the police about the alibi because he had refused to be interviewed. On redirect Ortega explained that he had given his exculpatory information to the defense attorneys and their investigator a year before the trial. Therefore, even assuming that the prosecutor's questioning in this area amounted to misconduct, we conclude that defendant suffered no significant prejudice as a result of it.

Defendant complains about questions concerning remarks made in the elevator after Ortega's testimony on direct examination. The prosecutor, defense counsel, and Ortega had a conversation in the elevator as they left the courthouse. No jurors were present in the elevator. The following morning, defense counsel reopened direct examination and questioned Ortega about the conversation in the elevator. Ortega testified that the prosecutor threatened him and said "someone is going to jail behind this."

On cross-examination the prosecutor asked Ortega whether he (the prosecutor) had made the alleged threat in response to a question asked by defense counsel. When Ortega answered yes, the prosecutor asked if defense counsel had said "Well, how do you guys like what happened in there today?" Defense counsel objected and denied making the statement. The objection was overruled. Ortega responded that he had heard defense counsel say only, "What's up?"

Defendant argues that the prosecutor's question was asked in bad faith. The claim is supported by nothing more than defendant's bald assertion. No police officers who overheard the conversation were called as witnesses by either the prosecution or the defense. Since the record

contains no basis for branding the prosecutor's questioning as bad faith, we reject defendant's contention.

9. *Prosecutor's Argument.*

Defendant contends that the prosecutor committed prejudicial misconduct in a number of respects in addition to the claims that we have already discussed. First, defendant charges the prosecutor with improper attacks on defense counsel. During the course of his lengthy review of the testimony of virtually every witness the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as "ridiculous" and "nonsense." Defendant interprets the prosecutor's characterization of the defense testimony as lies and concoctions, to be an accusation of defense fabrication of evidence. Defendant also complains about the prosecutor's repeated references to defense counsel's reaction to particular testimony.

"A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 580 [189 Cal.Rptr. 855, 659 P.2d 1144].) We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion. (*People* v. *Bain* (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564].) We have also held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such implication impinges upon defendant's constitutional right to counsel. (Compare *People* v. *Turner* (1983) 145 Cal.App.3d 658, 674 [193 Cal.Rptr. 614].) Instead it is sufficient to note that defendant's conviction should rest on the evidence, not on derelictions of his counsel. (*People* v. *Perry* (1972) 7 Cal.3d 756, 790

[103 Cal.Rptr. 161, 499 P.2d 129]; *Bain, supra,* 5 Cal. 3d at p. 847.) Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People* v. *Thompson* (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].)

Defendant objected to many, but not all, of the cited instances. For the most part, his objections were overruled. The court did, however, sustain his objection to the accusation of perpetrating a fraud on the court. It admonished the jury to disregard the comment, stating that there had been no perpetration of a fraud by any lawyer in this case. While we agree that many of the cited remarks were improper, we do not find them to have been prejudicial. The prosecutor was entitled to argue the inconsistencies in the evidence and even to characterize inconsistent testimony as "lies." (See *People* v. *Edelbacher, supra,* 47 Cal.3d at p. 1030.) Here, however, the prosecutor went beyond that point on several occasions, denigrating counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's reference to counsel's reaction to particular evidence was also improper for the same reason, but we do not interpret it as a charge of fabrication of evidence. All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. (See *People* v. *Poggi, supra,* 45 Cal.3d at p. 340.) Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. (*People* v. *Green, supra,* 27 Cal.3d at p. 36.)

Defendant also contends that the prosecutor committed misconduct because he expressed personal opinions regarding the defense case. Defendant refers to the prosecutor's statement that "I shake my head in disbelief every time I think about it [Ralph Ortega's testimony]." De-

fendant also makes reference to the prosecutor's statement: "They know the defendant killed those boys. And they know he killed Ray and Marlene Wells." Finally, defendant complains about the prosecutor's argument about the disparities between defense promises of proof in the opening statement and the trial evidence. Defendant waived all but the first point by failing to raise a timely objection at trial. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) As to the first point, the remark was made in the context of reviewing the discrepancies in defense testimony and was not likely to be understood as being based on anything outside the record.

Defendant further charges that the prosecutor committed misconduct by referring to defendant's failure to testify at trial. The prosecutor argued that he forestalled defense testimony by preemptively proving that defendant did not need glasses at the time of the Belvedere Park offenses: "I should not have proved to you earlier in the trial that he didn't need glasses at the time in the park, because then you would have heard, 'Well, I was in the park, and you can see all the witnesses say I didn't have any glasses on. And I saw one guy go do my friend in with a knife. And another one came to me, and I thought he was going to do me in. I ran over to help my friend and shot him, and I shot him twice. I saw the other one. I couldn't see good who was doing what to me, so I shot him. And the other one coming at me, I shot him, too, because I just couldn't see good.' That's what you would have heard." A defense objection under *Griffin* v. *California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] (*Griffin*) was sustained, and the court admonished the jury to disregard the prosecutor's comments to the extent they reflected on the defendant's not testifying. The prosecutor referred to the glasses again in his rebuttal, stating: "And I argued in my opening argument the fact that you would hear or you would have heard, had we given them a little rope to hang themselves, also you would have heard, 'Well, I couldn't see. I didn't have

my glasess on, so therefore that's why I shot this person and I had to shoot this person.' " The defense objection was overruled.

We believe that the court's initial admonition was sufficient to obviate any *Griffin* concern. To the extent that the rebuttal comment could be construed as a reference to defendant's failure to testify, in context, it was clearly harmless. The reference was a minor feature in this seemingly marathon argument.

Defendant contends that the prosecutor committed misconduct by referring to defendant's courtroom appearance (wearing a suit, wearing reading glasses, being cleanshaven) as a "ploy" and by asserting that defendant did not need to wear the glasses all the time during the trial. Defendant waived these points by failing to object at trial, since any harm could have been cured by timely objection and prompt admonition. (*People* v. *Green*, *supra*, 27 Cal.3d at p. 27.) In any event, these statements could not have had a prejudicial effect in light of the overwhelming evidence of the Belvedere Park killings.

In sum, we find no denial of due process or a fair trial as a result of any misconduct committed by the prosecutor. Both sides seemed unduly argumentative and personal on occasion, but such instances were not so frequent or severe as to detract from the jury's fair consideration of the evidence.

10. *Instruction on Reasonable Doubt.*

In a supplemental brief, defendant argues that the instruction on reasonable doubt, CALJIC No. 2.90, is constitutionally flawed, citing *Cage* v. *Louisiana* (1990) 498 U.S. —— [112 L.Ed.2d 339, 111 S.Ct. 328]. Similar challenges to CALJIC No. 2.90 were raised and rejected in *People* v. *Jennings* (1991) 53 Cal.3d 334, 385-386 [279 Cal.Rptr. 780, 807 P.2d 1009] and *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1234-1235 [—— Cal.Rptr. 2d —— P.2d ——]. As we noted in *Jennings* and *John-*

son, despite use of the term "moral certainty" in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in *Cage* v. *Louisiana*, *supra*, 498 U.S. —— [112 L.Ed.2d 339, 111 S.Ct. 328].

Defendant also cites Justice Mosk's criticism of CALJIC No. 2.90 in his concurring opinion in *People* v. *Brigham* (1979) 25 Cal.3d 283, 292-316 [157 Cal.Rptr. 905, 599 P.2d 100]. Recognizing that CALJIC No. 2.90 is a verbatim copy of section 1096, Justice Mosk urged the Legislature to redraft the definition of reasonable doubt in section 1096 to make it intelligible to modern juries. The Legislature has not responded. As Justice Mosk recognized, such changes must come from the Legislature.

PENALTY PHASE FACTS

Evidence in Aggravation.

The penalty case-in-aggravation consisted of evidence of three prior crimes by defendant: 1) a 1978 assault upon a police officer; 2) a 1979 conviction of assault with intent to commit murder; and 3) a 1985 assault on a fellow jail inmate.

1. *1978 Assault.*

Deputy Sheriff Randall Prestwich testified that on May 13, 1978, he and his partner heard gunshots in the vicinity of Arizona Street in Los Angeles. They saw defendant and two other men run from a house. Defendant had a shotgun. Deputy Prestwich yelled at the men to freeze. The other two ran off, and defendant brought the gun up to his waist and flinched, as if he expected the gun to go off. Deputy Prestwich fired a shot at defendant and saw defendant flinch again. Defendant turned and ran. Deputy Prestwich caught him and arrested him for assault on a police officer.

2. *1979 Assault.*

Ernest Leos testified that on March 17, 1979, he and his son were in their driveway when Jesse Trujillo's car stopped in front of the driveway. Leos's son, Ernest, Jr., went over to the car and was shot while talking to someone in the car. Defendant was convicted of assualt with intent to commit murder for this shooting.

3. *1985 Assault.*

Deputy Sheriff Kenneth Salazar testified that on March 21, 1985, defendant was working as a trusty in the high security section of Los Angeles County jail. After defendant had finished passing out and collecting breakfast trays, he was ordered back to his cell so that Guy Walker could leave his cell to take a shower. Walker received a razor blade and soap and went into the shower. Defendant was then released from his cell to complete his duties.

Deputy Lujan saw defendant run into the shower area, approach Walker, and move his fist toward Walker's head. Deputy Salazar saw defendant run from the shower area to the toilet area. As he followed defendant, Deputy Salazar saw Guy Walker slumped on the floor with blood on his face. Deputy Salazar heard a toilet flush. When he reached the toilet area, defendant was standing over a toilet. Deputy Salazar found a small piece of razor in the doorway leading to the toilet area. Walker's injuries could have been caused by a razor blade.

Evidence in Mitigation

1. *Walker Incident.*

Guy Walker testified for defendant. He and defendant had several arguments in March 1985 because defendant had been named trusty and had the cell Walker wanted. Walker tried to cut defendant's throat and to stab him. That same week, defendant entered the shower area and they fought.

2. *In-custody Behavior.*

Deputy Sheriffs Ronald Hernandez and Anthony Campbell, assigned to the Los Angeles County jail, had never had problems with defendant. Defendant was helpful and friendly, and both deputies voted for him to be appointed a jail trusty.

3. *Defendant's Family and Friends.*

Patricia Solis struck up a friendship with defendant after she had been dismissed as a prospective juror in the case. She described defendant as an intelligent and sensitive person, who cared about other people, and loved his children.

Edward Dominguez had known defendant since 1976, when he opened his liquor store in the neighborhood. Defendant was always a gentleman and, on one occasion, prevented a fight in the store.

Richard Rodriguez, a gang consultant affiliated with the California Youth Authority, testified that although Arizona Marivilla was once a street gang, since 1982 it had been incorporated as a neighborhood association. Defendant participated in the youth program when he was released from prison in May 1984.

Defendant's wife and son described him as a nice, lovable man who is a good father.

Defendant's mother, Elizabeth Luna, testified that defendant's father, who had been abusive to her and the children, died when defendant was six or seven. Luna then "went wild," and began drinking and partying. Defendant became "the man of the house" upon his father's death, and he took care of his four brothers and sisters, even stealing on occasion so they could eat.

PENALTY PHASE CONTENTIONS

1. *Evidence of Gang Affiliation.*

Defendant contends that the erroneous admission of his gang affiliation in the guilt phase prejudiced him in the penalty phase because he had to call Richard Rodriguez to rebut that evidence and the prosecutor improperly cross-examined him.

As previously noted, Richard Rodriguez testified in mitigation that the Arizona Marivilla gang, which had been violent, was reformulated in 1982 as a neighborhood association with the goal of keeping the peace. He testified that after defendant left prison in 1984 he was not involved in gang activities and that defendant was working to keep young people out of gangs. On cross-examination the prosecutor asked Rodriguez if it was true that Arizona Marivilla was one of the most violent gangs in East Los Angeles and responsible for most of the murders in that area from 1975 to 1985. The prosecutor also asked if defendant was one of the most active members.

We find no error. First, we have already concluded that the evidence of defendant's gang membership was properly admitted at the guilt phase. Second, the prosecutor was entitled to attempt to negate the evidence in mitigation to the effect that the Arizona Marivilla was now simply a peaceful neighborhood association. (*People* v. *Thompson, supra,* 45 Cal.3d at p. 124.) It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually took place. (*People* v. *Siripongs* (1988) 45 Cal.3d 548, 578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

2. *Consideration of Defendant's Age.*

Defendant contends that the jury was improperly allowed by the court and prosecutor to consider his age as a factor in aggravation. Defendant was 26 at the time of the offenses. The court rejected defendant's special instruction stating that if defendant's age were to be considered, it could be considered only as a mitigating factor. The court gave CALJIC No. 8.84.1, which permitted the jury to consider "the age of the defendant at the time of the crime" in determining the appropriate penalty.

During the penalty argument, the prosecutor reviewed the factors listed in CALJIC No. 8.84.1 and argued: "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Defendant acknowledges that we have rejected attacks on the instruction given. (See, e.g., *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 301-302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we noted in *People* v. *Lucky, supra,* at page 302, mere chronological age should not of itself be deemed either aggravating or mitigating: "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-relaed inference in every case. (*Ibid.*)

The court did not err in rejecting defendant's proposed special instruction, since it stated that inferences relating to defendant's age could be considered only as a mitigating factor. Nor was there any impropriety in the prosecutor's argument. The prosecutor's argument that defendant was old enough to know better, thus making it aggravating, is an age-related inference that has been found

permissible in a number of cases. (See *People* v. *Bonin* (1988) 46 Cal.3d 659, 704-705, fn. 6 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People* v. *Brown* (1988) 46 Cal.3d 432, 456-457 [250 Cal.Rptr. 604, 758 P.2d 1135].)

Defendant urges us to reexamine our construction of the age factor in *People* v. *Lucky, supra,* 45 Cal.3d 259 and succeeding cases, arguing that the unfettered discretion regarding how the factor is to be considered renders it unconstitutional under the principles of *Gregg* v. *Georgia* (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and *Maynard* v. *Cartwright* (1988) 486 U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853]. We rejected a similar argument in *People* v. *Babbitt* (1988) 45 Cal.3d 660, 716 [248 Cal.Rptr. 69, 755 P.2d 253] and are not persuaded that we should reexamine that reasoning. (See also *People* v. *Edwards* (1991) 54 Cal.3d 787, 844 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

3. *Reference to Suffering by Victims and Their Families.*

Defendant contends that the prosecutor violated *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529] and *South Carolina* v. *Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207] by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families. The allegedly objectionable references were made in response to defense counsel's argument that the jury should consider defendant's difficult childhood, including the fact that he had to become the man of the house at the age of eight, as illustrated by a photograph of defendant at his father's funeral.[4]

The prosecutor stated: "I want you to think about this. I want you to look at this picture very hard. When

[4] Defendant's mother testified that defendant was six or seven when his father died. The prosecutor, however, referred to defendant as having been eight at the time of his father's death.

you have got it back there in that room look at it. How hurtful it was at the time or hurtful it is when you see it years later. But remember the Aceves family. Replace all these faces. Put Anthony Aceves in the casket.

"Put Anthony Aceves in that casket. Put his family around it. Because it happened two years ago they are not victims? They are hurt. He should be given compassion? The way he executed that boy?

"Think about the parents and the family of Gilbert Martinez. When they were standing around his casket and they were crying and they were saying 'My God, how could this happen to my child?'

"Marlene Wells. When she was on the ground and the defendant was standing over her and putting two bullets in the back of her head just before she is looking up at him. 'Don't kill me.' Begging for her life. And he shoots her brutally in the back of her head.

"Think about it. They are funerals. Every time you look at this funeral photograph produced by the defense you think of their funerals. You think of their families. And you are called upon to impose death in cases like this when it's so aggravated. How many people must he kill?"

During the pendency of this appeal, both *Booth* v. *Maryland*, *supra*, 482 U.S. 496 and *South Carolina* v. *Gathers*, *supra*, 490 U.S. 805, were largely overruled. In *Payne* v. *Tennessee* (1991) 501 U.S. —— [115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court held that the use of victim impact evidence does not offend the Eighth Amendment guaranty of an individualized penalty assessment in a capital trial. We have since held that the injury inflicted by the defendant—including evidence about the victim and the impact of the crime on the victim's family—is one of the circumstances of the crime, evidence of which is admissible under Section 190.3, factor (a). (*People* v. *Edwards*, *supra*, 54 Cal.3d

787, 833-836; *People* v. *Fierro* (1991) 1 Cal.4th 173, 234-235 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

The prosecutor's remarks qualified for admission under the principles set forth in *Payne* v. *Tennessee*, *supra*, 501 U.S. —— [115 L.Ed.2d 720, 111 S.Ct. 2597] and *People* v. *Edwards*, *supra*, 54 Cal.3d 787. Accordingly, defendant's claim must be rejected.

4. *Biblical References.*

Defendant contends that the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument. We agree that the prosecurtor's argument was improper, but we conclude that it does not require reversal of the penalty judgment.

During final argument, defense counsel stated, inter alia: "It seems almost to be the theater of absurd to be talking about life and death. I don't know what gives me the right to talk about it. . . . [¶] What we have to really talk about is values, purpose. You have to confront yourselves in terms of your own feelings, what you demand from society, what you really demand from Mr. Sandoval, what you demand from yourselves. [¶] Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the State of California. Period. He will never come out. He will die in the penitentiary. [¶] The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.

"And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God to an individual. . . . [¶] In some sense, I really don't know which is worse, execution or the gas chamber or that kind of life in prison. But you have that power alone. Any one of you can stop the execution alone. You have that power. I have never held that awesome power of holding a person's life in my hands. You have that power. You alone. [¶] You also have that responsibility that you are going to carry for the very rest of your life whether you push that button or not. And the bottom line is it's revenge. Because society to you because you are society, you want to extract revenge. Or is it bad enough to stop it and let this man live out his life in prison? . . . [¶] I have come to grasp it now. I looked at you in the eye and you can look back at me. Doesn't change anything. Nothing will bring Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance.

"If that's what you want, that's what you felt, you push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life. [¶] I don't think society requires revenge. I don't think that you require revenge. An eye for an eye. [¶] Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button."

The prosecutor responded to defense counsel's argument by stating: "He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. [¶] And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross

section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. [']Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well if it wasn't you called upon to carry out the will of the People of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. . . ."

"Mr. Appelbaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil. [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . . [¶] . . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

Defendant asserts that the material in the previous paragraph was a paraphrase of Romans 13:1-7 and that

such reliance on biblical authority to advocate imposition of the death penalty is improper. We agree.

The People seek to justify the argument as having been appropriate rebuttal to defense counsel's argument. While the question is close, we are of the opinion that the prosecutor's argument crossed the line of permissible argument and rebuttal. There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper when such comments are fairly responsive to the argument of defense counsel. (See *People* v. *McDaniel* (1976) 16 Cal.3d 156, 177 [127 Cal.Rptr. 467, 545 P.2d 843]; *People* v. *Hill* (1967) 66 Cal.2d 536, 560 [58 Cal.Rptr. 340, 426 P.2d 908]; see also *United States* v. *Robinson* (1988) 485 U.S. 25, 31-34 [99 L.Ed.2d 23, 30-33, 108 S.Ct. 864].) This however, is not such a situation.

Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People* v. *Hawthorne, ante*, 43, at p. 60 [—— Cal.Rptr.2d ——, —— P.2d ——].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People* v. *Love*, 1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination.

Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States* v. *Robinson, supra*, 485 U.S. at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, but by recourse to extraneous authority. (*Jones* v. *Kemp, supra*, 706 F.Supp. 1534, 1559.) We do not mean to rule out all reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.

Though we have found that the argument in this case constituted misconduct, we do not find that it requires reversal of the penalty judgment. The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. (See *People* v. *Brown, supra*, 46 Cal.3d 432, 448-449.) The result is the same under the federal *Chapman* test (*Chapman* v. *California* (1968) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

5. *Jury Deadlock.*

Defendant contends that the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock.

The jury retired for its penalty deliberations at 1:10 p.m. on Thursday, March 12, 1987, and deliberated until 2:45 p.m. Deliberations continued at 8:05 a.m. on Friday morning until the court recessed the jury at 11:45 a.m. to allow counsel time to submit argument on the appropriate response to a question submitted by the jury. The jury had been given separate verdict forms for each victim and it asked whether it could find that different penalties are applicable to different counts. On Monday morning, March 16, 1987, the court responded to the jury's question by stating, "you should reach a verdict as to each count if you can." At 8:50 a.m. the jury resumed deliberations and continued until court was adjourned at 1:30 p.m. Deliberations continued on Tuesday, March 17, for an hour and a half. After deliberating two and a half more hours the next morning, March 18, the jury sent the court a note stating, "We cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" The court called the jury out and asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible' that the jury can arrive at a verdict as to any count given further deliberations, the rereading of any testimony or the answering of any question that I can answer?" The foreman answered, "No. We have discussed that possibility, and we don't believe that we can reach a verdict." The court then asked for the jury division on each count and was told that it was six to six on count 1, six to six on count 2, five to seven on count 3, and five to seven on count 4. The court then polled each juror as to "whether you think there is a reasonable possibility with further deliberations you can arrive at a verdict as to any of the counts," and each juror replied, "No."

In a conference outside the jury's presence, the court indicated that it wanted the jury to spend a little more time and that it would probably declare a mistrial if the jury did not reach a verdict the next day. The court estimated that the jury had deliberated for about three full days and noted that a little more time would not be unreasonable in light of the fact that the trial had lasted five months. The court released the jury for that day with directions to return at 7:45 a.m. the next morning. After further deliberations the next morning, Thursday, March 19, 1987, the jury returned its verdicts of life without possibility of parole as to counts 1, 2 and 3, and a verdict of death as to count 4.

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

"The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. (*People* v. *Miller* (1990) 50 Cal.3d 954, 993 [269 Cal.Rptr. 492, 790 P.2d 1289]; *People* v. *Sheldon* (1989) 48 Cal.3d 935, 959 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 775 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Rojas* (1975) 15 Cal.3d 540, 546 [125 Cal.Rptr. 357, 542 P.2d 229, 92 A.L.R.3d 1127]; *People* v. *Carter* (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].) The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (*People* v. *Carter, supra*, 68 Cal.2d at p. 817.)" (*People* v. *Breaux* (1991) 1 Cal.4th 281, 319 [3 Cal.Rptr.2d 81, 821 P.2d 585].) The question of

coercion is necessarily dependent on the facts and circumstances of each case. (*Ibid.*)

Defendant argues that the length of time the jury had been deliberating demonstrates that the jury had given careful consideration to the evidence and that a mistrial would have been warranted. (Compare *People* v. *Rich, supra,* 45 Cal.3d 1036, 1117 [court declined to declare mistrial on penalty after jury declared itself unable to reach verdict following only one hour of deliberation].) Defendant also cites the virtually even split and the jurors' individual statements against the usefulness of further deliberations as indicating that the court should have declared a mistrial. None of these factors, however, removed the court's discretion to require further deliberations. The jury had deliberated a similar amount of time in *People* v. *Breaux, supra,* 1 Cal.4th 281, 317-320, when it was asked to continue even though all of the jurors were negative on the prospects of a verdict. In *People* v. *Rodriguez, supra,* 42 Cal.3d 730, 774-777, we found no abuse of discretion in requiring the jury to continue deliberating after it declared itself unable to reach a verdict following 18 days of deliberation.

As further evidence of his claim that the verdict was coerced, defendant points to the facts that the order to continue deliberations was unaccompanied by further explanation and that the verdicts were reached shortly thereafter. The form of the verdicts—three for life and one for death—is also cited as evidence of "considerations of compromise and expediency" (*People* v. *Carter, supra,* 68 Cal.2d at p. 817) rather than independent judgment. We are not persuaded. Other explanations for the difference in the verdicts are readily apparent. The jury may have felt that only one death verdict was necessary and that the killing of Marlene Wells was most egregious since she had no involvement with defendant. Thus the difference in the verdicts may be explained by the difference in the circumstances of the crimes. Defendant's assertion

that the verdicts should have been uniform is based on the incorrect premise that the aggravating and mitigating circumstances were the same as to each count. They were not. Each murder had its own set of circumstances, which qualified for consideration under factor (a) of section 190.3.

Nothing in the record suggests that the jury was coerced in any way. The court made no statements that could be interpreted as exerting pressure on any juror. The court viewed the jury as a responsible group that took its duty seriously. The court was not unreasonable in concluding that, in light of the fact that the trial itself had taken some five months, the jury should put in a little more time than the fourteen and one-quarter hours it had deliberated up to that point. The record shows no abuse of discretion.

6. *Separate Verdict Forms.*

Defendant contends that the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim. Defendant argues that the multiple verdicts obscured the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances and invited compromise verdicts. He also claims that the multiple penalty verdicts placed undue emphasis on the characteristics and status of individual victims, relying on *Booth* v. *Maryland, supra,* 482 U.S. 496 and *South Carolina* v. *Gathers, supra,* 490 U.S. 805. We are not convinced.

A defendant who kills more than one person may be convicted and punished for each murder. (*People* v. *Andrews* (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; *People* v. *Ramos* (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in *People* v. *Bittaker* (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted

of first degree murder of five victims and was given separate death verdicts as to each murder victim. (*Id.* at pp. 1106, 1110, fn. 34.) Likewise, the defendant in *People* v. *Mattson* (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (*Id.* at p. 838). We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

7. *Standard for Imposition of Death.*

The court gave CALJIC No. 8.84.2 (1986 rev.) on the standards for determining the penalty verdicts. Defendant objects to the following language in that instruction: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole." Defendant complains that the instruction did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison."

We rejected a similar challenge to this language in *People v. Breaux, supra,* 1 Cal.4th at pages 315-316. There, as in this case, the language in question was preceded by instructions that provide: "The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various . . . factors you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating factors with the

totality of the mitigating factors." The instructions given, in our view, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

8. *Cumulative Error.*

Defendant contends that the cumulative effect of errors during the penalty phase trial requires reversal of the penalty. Since we have found only one error in the penalty phase, there is no cumulative effect.

Conclusion

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J., Concurring and Dissenting.—I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, no error or other defect is evident requiring reversal or vacation on any of these issues.

I dissent, however, from the judgment as to the sentence of death. As will appear, there was prejudicial prosecutorial misconduct bearing on this question.

I

In summation at the penalty phase, defense counsel urged the jury to fix the penalty for defendant at life imprisonment without possibility of parole.

By contrast, the prosecutor asked for death. In the course of his argument, he made the following comments.

"I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge.

"And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. ['Each and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.']

"Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state.

"Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.

". . . .

"[Defense counsel] says don't play God. ['Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sworn for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.']

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . .

". . . .

". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

At this point, defense counsel objected and asked to approach the bench, but met with summary denial.

II

"It is of course misconduct for a prosecutor to invoke purported religious law in support of the imposition of the penalty of death." (*People* v. *Hill* (1992) 3 Cal.4th 959, 1016 [— Cal.Rptr.2d —, — P.2d —] (conc. opn. of Mosk, J.); accord, *People* v. *Wrest* (1992) 3 Cal.4th 1088, 1107 [— Cal.Rptr.2d —, — P.2d —].)

"Argument of this sort by a representative of the government offends California statutes and judicial decisions, which establish the positive, secular law of this state as the rule governing the choice between life and death (see *People* v. *Mincey* (1992) 2 Cal.4th 408, 483-484 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)). It also violates the United States and California Constitutions—including their respective clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)." (*People* v. *Hill, supra,* 3 Cal.4th at pp. 1016-1017 (conc. opn. of Mosk, J.); see also *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107 [holding that "such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher

law should be applied in capital cases, displacing the law in the court's instructions"].)

"It is well settled that religion may not play a role in the sentencing process." (*Jones* v. *Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; accord, *People* v. *Mincey* (1992) 2 Cal.4th 408, 485 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The invocation of "the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

Indeed, the "use . . . of an extrajudicial code . . . cannot be reconciled within the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction." (*Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559; accord, *People* v. *Mincey, supra,* 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.)

The Bible, of course, is just such an extrajudicial code. (*People* v. *Mincey, supra,* 2 Cal.4th at p. 483 (conc. & dis. opn. of Mosk, J.); *Jones* v. *Kemp, supra,* 706 F.Supp. at p. 1559.) Its commands and prohibitions cannot be

viewed as mere reliquiae of a culture separated from ours by thousands of miles and thousands of years. This is because "[t]o the average juror, . . . the Bible is an authoritative religious document . . . ." (*Jones* v. *Kemp, supra,* at p. 1599; accord, *People* v. *Mincey, supra,* at pp. 483-484 (conc. & dis. opn. of Mosk, J.).)

It is also misconduct for a prosecutor to seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (*Caldwell* v. *Mississippi* (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 247, 105 S.Ct. 2633]; accord, *People* v. *Wrest, supra,* 3 Cal.4th at p. 1107.) "[U]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" (*Caldwell* v. *Mississippi, supra,* at p. 329 [86 L.Ed.2d at p. 239], quoting *California* v. *Ramos* (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446].) The assumption underlying Eighth Amendment jurisprudence is that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" (*Caldwell* v. *Mississippi, supra,* at p. 341 [86 L.Ed.2d at p. 247].) This premise is threatened when a representative of the government attempts to undermine the jurors' proper attitude and approach.

It hardly needs mention that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].)[1]

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[1] Because the issue is not raised in this case, I do not attempt to define "religious" misconduct *by defense counsel.* Certainly, the task would require some delicacy. For example, the provisions of the United States and California Constitutions that constrain the prosecution in this regard—including the clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I,

III

On the very face of the record, prosecutorial misconduct is manifest.

To begin with, the prosecutor invoked purported religious law in support of the imposition of the penalty of death. That is indisputable.

As noted, the prosecutor stated: "[Defense counsel] says don't play God. ['] Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.['] [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right." The prosecutor returned to the point: "Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

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§ 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)—are generally inapplicable to the defense. (But see Cal. Const., art. I, § 29 ["In a criminal case, the people of the State of California have the right to due process of law . . . ."].) I leave this labor to another day. The majority should do so as well. They purport to distinguish between permissible references to "religion" and impermissible references to "religious law." Their "rule" may be suitable for sophists to debate in rhetorical exercises. It is altogether too vague for the bench and bar to apply in criminal trials.

In a word, the "rule of decision" that the prosecutor urged the jury to apply was assertedly religious. He cited the Bible to the jurors. To be sure, he did not expressly identify the relevant passage—which is Romans 13:1-4—as biblical in source and in substance. No such identification was required. There is no reasonable likelihood that the jury understood the words to be anything other than what they were.

Further, the "purpose of punishment" that the prosecutor called on the jury to serve was assertedly religious as well. He exhorted the jurors to destroy defendant's corruptible body in order to save his immortal soul.[2]

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[2] In accord with above analysis in *Commonwealth* v. *Chambers* (1991) 528 Pa. 558 [599 A.2d 630]. There, the Pennsylvania Supreme Court considered a claim of prosecutorial misconduct based on comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" It found the point meritorious. Its reasoning was as follows.

"In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. *Commonwealth* v. *Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonweath* v. *Whitney*, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

"Here, the prosecutor argued, 'As the Bible says, "and the murderer shall be put to death."' This reference is substantially different than the references tolerated in *Henry* and *Whitney* where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.

"More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [Chambers]. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death,' the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference

The majority rightly conclude that the prosecutor's impropriety cannot be justified or even excused as "fairly responsive" to comments in defense counsel's summation. True, the prosecutor asserted that he "want[ed] to respond to some of the things argued by [defense counsel]." But there was nothing "fairly responsive" about what he would soon say. Perhaps the matter would have been different if counsel had declared or even suggested that the death penalty was inappropriate under some religious law. He had not done so. Notwithstanding his utterance of the word "God" and his reference to *lex talionis*, his argument was altogether secular—to the effect that the jurors each held an absolute power of life and death over defendant; that they should reject death as empty vengeance; and that they should choose life to vindicate what is good in human beings and human society.

More important, even a "fair response" of this kind by a prosecutor would be altogether impermissible. It is plain from the analysis set out above that the government is prohibited from interjecting religion into the sentencing process. The prosecutor is its representative. The bar that constrains the principal constrains the agent as well.

In addition, the prosecutor sought to minimize the jury's sense of responsibility for determining the appropriateness of death. That too is indisputable.

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to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

"Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." (*Commonwealth* v. *Chambers*, *supra*, 528 Pa. at pp. 586-587 [599 A.2d at p. 644].)

As noted, the prosecutor stated: "The defense wants to make [the penalty determination] burdensome for you ['] Every and everyone [*sic*] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

The prosecutor's impropriety in this regard cannot seriously be denied. Indeed, the majority's efforts here are totally nonexistent—and that in spite of the fact that defendant expressly raised the claim in his briefing before this court.

I now turn from the fact of the prosecutor's misconduct to its consequence.

It is the general rule for error under California law that reversal requires prejudice (*People* v. *Gordon* (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251]) and prejudice in turn requires a reasonable possibility of an effect on the outcome when, as here, penalty in a capital trial is involved (*People* v. *Brown* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135]).

Similarly, it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the government shows that the failing was harmless beyond a reasonable doubt. (See, e.g., *Rose* v. *Clark* (1986) 478 U.S. 570, 576-579 [92 L.Ed.2d 460, 469-471, 106 S.Ct. 3101].)

The prosecutor's misconduct implicates both California law and the United States Constitution. It appears to be subject to the general rule of harmless-error analysis. Thus, insofar as state law is concerned, the "reasonable possibility" standard is applied. Insofar as the federal charter is involved, the "reasonable doubt" test is employed.

The prosecutor's misconduct went to the first, last, and only issue before the jury in the penalty phase of this capital trial, viz., whether they were to take or spare defendant's life. The evidence in aggravation was not insubstantial. But not insubstantial too was the evidence in mitigation.

The prosecutor's attempt to minimize the jury's responsibility cannot be deemed unsuccessful. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell* v. *Mississippi, supra,* 472 U.S. at p. 333 [86 L.Ed.2d at p. 242].) Comments like those of the prosecutor in this case offered the jurors an easy way to avoid a hard choice—in fact, an especially hard choice, to judge from the relatively close balance of aggravation and mitigation at the penalty phase and the labored progress of the deliberations thereafter.

Perhaps more significant, the prosecutor's argument from purported religious law must have carried special force, incorporating as it did "what many consider an authoritative source—if not Authority Itself." (*People* v. *Mincey, supra,* 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

I acknowledge that the jury did not return its verdict of death immediately after the prosecutor's misconduct and that it also returned three verdicts of life. "That fact means only that [the] impropriety did not instantly [and totally] determine the outcome. It simply does not suggest that it was without improper influence." (*People* v. *Mincey, supra,* 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk. J.).) The majority appear to assume that the force of the impropriety was dissipated in the course of deliberations. A contrary assumption, however, seems more reasonable on this record: the impropriety's force actually determined the course of deliberations and thereby prevented four early verdicts of life.[a]

In sum, the misconduct raises a reasonable possibility of an adverse effect on the outcome, and cannot be deemed harmless beyond a reasonable doubt.

IV

For the reasons stated above, I would set aside the sentence of death.

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[a] In accord on this point as well is *Commonwealth* v. *Chambers, supra,* 528 Pa. 558 [599 A.2d 630]. As noted, the Pennsylvania Supreme Court in that case held meritorious a claim of prosecutorial misconduct based on the comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.'" (See fn. 2, *ante.*) "Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth," concluded the court, "we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death . . . ." (528 Pa. at p. 587 [599 A.2d at p. 644].)

No. CR26405
S004765

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE,
Respondent

v.

ALFRED ARTHUR SANDOVAL,
Appellant

Petition for rehearing DENIED.

Mosk, J. is of the opinion the petition should be granted.

Opinion modified.

/s/ [Illegible]
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 92-9049

ALFRED ARTHUR SANDOVAL,
Petitioner

v.

CALIFORNIA

ORDER ALLOWING CERTIORARI

Filed September 28, 1993

The petition herein for a writ of certiorari to the Supreme Court of California is granted limited to Question 1 presented by the petition. The case is consolidated with No. 92-8894, *Victor v. Nebraska*, and a total of ninety minutes is allotted for oral argument. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.

September 28, 1993